United States Court of Appeals

for the Second Circuit

APPENDIX

ORIGINAL

74-2082

B

P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2082

FOTOCHROME, INC.,

Debtor-Appellant,

—against—

COPAL COMPANY LIMITED,

Claimant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

APPELLANT'S APPENDIX

UNITED STATES COURT OF APPEALS
FILED
DEC 2 1974
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

LOUIS P. ROSENBERG
Attorney for Debtor-Appellant
16 Court Street
Brooklyn, New York 11201
(212) 855-6840

WHITMAN & RANSOM
Attorneys for Claimant-Appellee
522 Fifth Avenue
New York, New York 10036
(212) 575-5800

32 CASE PRESS INC., 421 HUDSON ST., N.Y.—ORegon 5-4540

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PAGINATION AS IN ORIGINAL COPY

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DOCKET ENTRIES

ROSLING, [illegible] 70-[illegible] (Pet'd)

1a

NAME OF BANKRUPT/DEBTOR

Last First Middle

[illegible]

[illegible]-1970

ADDRESS OF BANKRUPT/DEBTOR (Number and Street)

49-20 - 33rd Street,

CITY [illegible] ZONE COUNTY [illegible]3 STATE N.Y.

DIST. NO. DIV. NO. DOCKET NO. 70-1-[illegible]

CHAPTER OR SECTION XI, 328

DATE PETITION FILED 3/[illegible]/70

DATE CLOSED

DISCHARGE: Granted / Denied / Waived or not applied for

DATE DISCHARGED

CHECK IF: Voluntary / Involuntary / Fee paid in installments / X Corporation

OCCUPATION (Check one): Farmer / Employee / Professional / Other Non-business / Merchant / Manufacturer / X Other Business

PETITION DISMISSED? ☐ YES | DATE DISMISSED | CHAPTER UNDER WHICH CASE WAS PENDING WHEN DISMISSED

NAME OF JUDGE

NAME OF REFEREE [illegible]. SHERMAN D. [illegible]

NO ASSET CASES ONLY CLAIMS AS SCHEDULED	TOTAL	PRIORITY	SECURED	UNSECURED
	$	$	$	$

	NAMES AND ADDRESSES
ATTORNEY FOR BANKRUPT OR DEBTOR	[illegible]. ROSLING, 26 Court St., Brklyn, N.Y.11201 ([illegible])
ATTORNEY FOR PETITIONING CREDITORS	
RECEIVER	
ATTORNEY FOR RECEIVER	
TRUSTEE	
ATTORNEY FOR TRUSTEE	

UL 56840

1

2

[illegible] 12 1974 CLERK CIRCUIT

CHANGES OF PRINCIPALS

DATE	PROCEEDINGS
3/[illegible]/70	Debtor's Petition, Corporate Resolution, Statement of Executory Contracts, Verified List of Creditors, Statement of Approximate Assets and Liabilities and Affidavit [illegible] ent to Rule XI-2, Sub-Division b filed and referred to Hon. Sherman D. Farmer, Referee. (1)
4/14/70	Copy of Schedules & Statement of Affairs received from Referee's office and filed. (2)
3/8/71	By Rosling,J.- Order to show cause returnable March 11,1971 at 2:15 P.M. why an order should not be made pursuant to Sec. 328, granting motions of Securities and Exchange Commission annexed hereto, (a) to intervene, etc. filed. (3)
3/8/71	Memorandum of Securities and Exchange Commission filed. (4)

FORM BK 74 D SEP. 1962

UNITED STATES DISTRICT COURTS

BANKRUPTCY DOCKET – COPY

☐ CHECK THIS BOX IF FILING FEES ARE PAID IN FULL AT TIME OF FILING

3/8/71	Before Rosling,J.- Hearing on order to show cause why an order should not be made pursuant to Sec. 328,etc. Hearing held . Court signed the order to show cause. Hearing held and Court directed the Clerk that this matter be referred to the next selected judge in its regular order. Assigned to: Rosling,J.
3/10/71	Affidavit of Service of Order to Show Cause, motions of S.E.C. and Memorandum of SEC. filed. (5)
3/10/71	Copy of letter dated 3/8/71 from Referee Sherman D. Warner to Louis P. Rosenberg, Esq. re: proposed amended schedules, etc. received and filed. (6)
3/11/71	Before Rosling,J.- Hearing on order to show cause why an order should not be made pursuant to Section 328 of the Bankruptcy Act, etc. Case called and Hearing continued to 3/12/71 at 3:15 P.M.
3/12/71	Before Rosling,J.- Hearing on order to show cause why an order should not be made pursuant to Section 328 of the Bankruptcy Act, etc. Case called. Hearing held and concluded. Court reserved decision. Stay will continue until decision is rendered by the Court. Proceeding in Chapter XI is stayed. Business will operate in its present fashion,etc. All papers to be submitted to the Court by 4 P.M. on March 17, 1971.
3/18/71	By Rosling, J. - Order filed that debtor's time to submit briefs and other affidavits and papers in opposition to the motions by Security Exchange Commission be extended to March 19, 1971. (7)
3/19/71	Copy of Debtor's Proposed Modified Arrangement filed. (8)
3/19/71	Affidavit of Louis P. Rosenberg filed. (9)
3/19/71	Debtor's Memorandum in opposition to Motions of S.E.C. filed. (10)
3/19/71	Memorandum filed by Sullivan & Cromwell,Attys. (11)
3/24/71	Reply Memorandum of the Securities and Exchange Commission filed. (12)
3/24/71	Affidavit of Service of Reply Memorandum of SEC filed. (13)

(Continued)

DATE	PROCEEDINGS
3/30/71	By Rosling, J.- Interim Memorandum and Order filed. The motions of the SEC are disposed of in part as follows, decision being reserved as to the remainder of the relief applied for. 1) Motion of SEC to intervene in Chap. XI proceedings granted. 2) Stay of all proceedings under Ch XI, other than continued operation of business, etc. is granted, effective forthwith and to continue pending determination of motions. 3) Motions are set down for evidentiary hearing and for argument on April 9, 1971 at 10:00 A.M., etc. The foregoing is the interim decision and order of the court. SO ORDERED. (14)
4/9/71	Before Rosling, J. - Hearing on Motions for SEC for evidentiary hearing and for argument. Case Called - Hearing Held and Concluded. Decision Reserved.
4/19/71	Notice of Motion filed returnable April 26, 1971 at 10:0 A.M. for an order deferring a decision on SEC's motion, pursuant to Sec. 328,etc. (15) (Motion rescheduled for April 23, 1971)
4/23/71	Before Rosling, J. - Motion to defer decision - Hearing held and adjd. to May 14th, 1971, at 10:00 A.M. Stay is continued until the further order of this Court.
5/14/71	Before Rosling,J.- Motion to defer decision,etc. Case called. No appearances on behalf of SEC and debtor. With the consent of the Judge who is ill, Mr. Ronald De Pretis his law clerk told the Clerk that Lawrence J. Toscano, Attorney for the SEC called the Judge over the phone, th the case has been settled and that a written stipulation will be submitted this afternoon to the Judge.
5/17/71	Stipulation in respect of pending motion by the SEC unde Sec.328,etc. received. (16)
5/20/71	By Rosling,J.- Order filed that Fotochrome shall file in its pending Chap. XI proceeding a proposed amended arrangement to provide the terms and conditions as listed; shall deposit in escrow the amount to be paid to debentu holders,etc.; all parties to join in a request seeking t modify stay in Memo & order of March 29, 1971,etc.; proposed amended arrangement to be confirmed by Chap. XI cou no later than 3 months from date of such approval; if stipulation be approved SEC to withdraw pending motion u der Sec.328.Failure to adhere to listed conditions, Fotochrome agrees will file an amended petition which complies with requirements of CHAP. X, within such time as Court may allow. (16a)
5/27/71	By Rosling, J. - Order on Stipulation filed modifying stay contained in order dated March 29, 1971, to permit Fotochrome to implement the provisions of the stipulation

DATE	PROCEEDINGS
	dated May 13, 1971, approved by order of the Court dated May 20, 1971, provided, however, that no order confirming an arrangement for Eastern shall be entered prior to the entry of an order confirming an arrangement for FOTOCHROME. (#17)
8/20/71	By Judd, J.- Order and Stipulation filed extending the time of Fotochrome, Inc., to procure confirmation of arrangement for a period of (3) months after August 17, 1971 etc. filed. (18)
11/18/71	By Rosling, J. -(Memorandum on Stipulation extending the time of Fotochrome, Inc.,to procure Confirmation)- Referred to Referee Sherman Warner, with full authority to act, said Chapter XI proceeding being heretofore been referred to him. (Filed) (19)
3/6/72	Referee's Certificate on Review of order dated 12/30/71 filed. (20)
3/24/72	Before Rosling,J.- Hearing on certificate of review filed 3/6/72 to review order made by Hon. Sherman D. Warner on 12/30/71. Case called. Submitted. Decision Reserved. All papers by April 7, 1972.
4/7/72	Debtor's Memorandum to affirm Referee's order filed. (Louis P. Rosenberg, Atty. for Debtor) (21)
4/24/72	Debtor's Supplemental Memorandum to affirm Referee's order filed. (Louis P. Rosenberg, Atty. for Debtor) (22)
5/25/72	By Rosling, J. - Opinion filed. Tax Court afforded priority of opportunity to try Fotochrome tax cases provided that trial is begun no later than Monday October 16, 1972, etc. Settle order on notice, submitting proposed order on or before June 9, 1972. (Review of order 12/30/72 by Ref. Warner) (23)
9/8/72	Before Rosling,J.-Hearing on settlement of proposed order aubmitted 8/22/72 by US.ATTY. of EDNY which memor. of the Court filed 5/25/72 directed to be settled on/before 6/9/72. Case called. No appearance on behalf of the Debtor. Order signed by the Court,.
9/8/72	By Rosling,J.-Order filed that a trial in the Bankruptcy Court not be scheduled providing a trial of the same tax claims of debtor pending in Tax Court commences no later than 10/16/72,etc. (24)

FPI—LK—4-9-64—75M—3298

DATE	PROCEEDINGS	DOCKET NUMBER
9/28/73	By Bartels,J.- Order filed that the time of Copal [illegible] to file a petition for review of such order of this Court ted 7/31/73 is extended to Oct, 9, 1973. (25)	
11/14/73	Letter from Bankruptcy Judge Parente received and filed enclosing Notice of Appeal which was filed October 9, 1973 with Bankruptcy Judge Parente, etc. to review Decision of Judge Parente dated July 31, 1973, etc. Assigned to: - - - - - - - WEINSTEIN, J. (26)	
11/15/73	Notice of Mailing of Appeal to Clerk,U.S.District Court, E.D.N.Y. by Judge Parente received and filed. (27)	
11/27/73	Order filed extending time for Copal Co. to file its brief on appeal from order of Referee Parente from Nov. 30, 1973 to Dec. 14, 1973 etc. filed. (28)	
12/21/73	Letter dated 12/19/73 from Whitman & Ransom, Esqs. to Weinstein,J.- enclosing Affidavit of Personal Service to be attached to Memorandum of Law filed on 12/18/73, etc. filed. (29)	
12/21/73	Before Weinstein, J. - Case called for review of Referee's order. Motion argued and Decision Reserved. Briefs to be submitted within a month.	
1/21/74	By Weinstein,J.- Stipulation filed extending time to submit briefs. For the debtor to 2/15/74 and Copal Co. to 2/26/74. (30)	
2/12/74	By Weinstein,J.- Stipulation filed extending time to submit appellant's brief to March 18th and appellant's reply to April 1st, 1974. So Ordered. (31)	
2/22/74	By Weinstein, J. - Order dated 2/12/74 received and filed for extension of time to submit respondent's brief to March 18, 1974 and Appellant's reply to April 1st, 1974. (32)	
3/15/74	Debtor Memorandum to Affirm Order of July 31, 1973 filed. (Louis P. Rosenberg,Esq/) (33)	
4/2/74	By Weinstein,J.- Order filed. Upon consent of debtor, Copal Ltd. will file its reply brief on April 5, 1974. Approved. So Ordered. (34)	
4/10/74	Affidavit of Whitman & Ransom,Esqs. filed. (35)	
4/10/74	Affidavit of " " (Appendix) filed. (36)	

DATE	PROCEEDINGS
4/10/74	Reply Memorandum filed. (Whitman & Ransom, Esqs.) (37)
4/17/74	Letter dated 4/11/74 from Louis P. Rosenberg, Esq. to Weinstein,J. re: Copal Claimetc. filed. (38)
4/29/74	Letter from Whitman & Ransom, Attorneys, to Hon. Jack B. Weinstein, U.S.D.J., dated April 24, 1974 filed. (Re: Reply to point raised by Mr. Rosenberg, counsel for the debtor-appellee, etc.) (39)
6/[illegible]/74	By Weinstein,J.- Memorandum and order filed. While our decision upholds the international obligations of the U.S., it may place American creditors at a disadvantage. The difficulty arises from unresolved inconsistencies between treaty law and preexisting national law. Here we find that the treaties take precedence. The decision of the bankruptcy Judge is reversed. So Ordered. (40) (Copy[illegible] to [illegible] 6/[illegible]/74.)
6/28/74	Notice of Appeal filed. (Appeal from Memorandum and order of Hon. Jack B. Weinstein,U.S.D.J.)(Copy mailed to Clerk,U.S.Circuit Court of Appeals and copy sent to Hon. Jack B. Weinstein)(Copy sent to Judge Parente) (41)

FPI—LK—4-9-64—75M—3298

Order Continuing Debtor in Possession

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

No. 70 B 209

In the Matter
Of
FOTOCHROME INC.

Debtor.

The debtor having filed a petition for an arrangement under Chapter XI of the Bankruptcy Act on March 26th, 1970 and the proceedings having been referred to the Honorable Sherman D. Warner, one of the Referees in Bankruptcy of this Court, and the debtor having been continued in possession of its property by order of Referee Sherman D. Warner dated March 27, 1970, and no receiver or trustee having been appointed, and the debtor-in-possession having appeared and requested leave to continue the operation of its business subject at all times to the control of this Court, and it appearing to the Court to be to the best interest of creditors that the said request be granted, and no one opposing, it is,

On motion of LOUIS P. ROSENBERG, attorney for the debtor-in-possession,

ORDERED, that the debtor-in-possession shall have all the title and may exercise, consistent with the provisions of Chapter XI of the Bankruptcy Act, all the powers of a trustee appointed pursuant to Section 44 of the Bankruptcy Act, and that the debtor-in-possession and all property

thereof shall be subject at all times during these proceedings to the control of this Court and to the following limitations, restrictions, terms and conditions:

1. The debtor-in-possession is hereby authorized to continue in possession of its property and to manage the same and to continue to conduct or perform its usual business or services or sell and distribute its products in a customary and proper manner for the benefit of its creditors, until April 23, 1970, without filing a bond or furnishing security to indemnify the estate against subsequent loss thereto or diminution thereof.

2. The Long Island Trust Co.—Garden City, L.I. for general account and Franklin National Bank—Thompson Ave., L.I. City for payroll and tax account is hereby designated as the sole depository for the funds of the debtor-in-possession; the debtor-in-possession shall maintain two accounts in said bank in connection with this proceeding: (1) a general business account, and (2) a tax and trust account; the checks drawn against either of said accounts shall be signed by the debtor-in-possession by Stella Rubin, Secretary or Frank Kauline, Chairman or Sam Einhorn, Vice President.

3. All checks drawn against the Tax and Trust Account shall also be inscribed on their face "Payee Approved, by Louis P. Rosenberg, attorney for the Debtor-in-Possession", who is hereby designated and authorized to sign all such checks before they shall be honored by said bank.

4. All moneys and receipts of whatsoever nature shall be deposited forwith in the general business bank account, and all payments and disbursements shall be by check drawn against said general business account, except petty cash payments and payments from tax and trust account.

(a) The weekly salary paid to officers and directors shall be as follows:

FRANK NADALINE, Chairman of the Board & Directors	$500.00
ALFRED FEUER, Vice-President	$300.00
STELLA RUBIN, Secretary	$190.00

5. There may be a petty cash fund not to exceed $200.00 which shall be established and maintained at that amount by withdrawals from the general business account. *Cash* payments shall be made only when necessary. A receipted bill or signed cash voucher shall be obtained for each petty cash payment and all such bills and vouchers shall be preserved.

6. No payments of any kind shall be made on account of or in reduction of obligations or unpaid wages existing at the time of the filing of the petition, unless such payments are permitted by Court Order. No obligations may be incurred by the debtor-in-possession except those which are necessary for the regular and usual operation or conduct of business, and they shall be paid when due.

7. No furniture, fixtures, equipment, machinery, tools, supplies or any part of the inventory or unprocessed raw materials, or work in process, or accounts receivable, shall be sold, transferred, mortgaged or pledged as security, or surrendered to any mortgagor or lienor or factor (regardless of the terms of such contemplated transaction) and no money shall be borrowed or property pledged, or conditional bill of sale or chattel mortgage made and delivered and no sale of the debtor's-in-possession business, or any part thereof or sale of purchase of any of its shares of capital stock, or alteration of its capital structure, or payment of dividends, or merger, consolidation, liquidation or dissolution, or assignment for the benefit of creditors shall be

made, and no debts of other persons shall be guaranteed in any manner, unless each such transaction is first specifically approved by Order of this Court. All Sales to Eastern Camera & Photo Corp. shall be for cash only.

8. Wages may be paid to regular employees (excluding officers, directors, and stockholders, the individual debtor, and the members of a co-partnership); and at the time wages are paid a receipt shall be obtained from each employee which shall reflect all proper deductions and the net wages received by said employee, unless payment of wages is made by check to each employee showing such deductions.

9. The debtor-in-possession is hereby directed and required to segregate and hold separate and apart from all other funds all moneys deducted and withheld from employees or collected from others for taxes under any law of the United States or of any state or municipality or political subdivision thereof during the pendency of the proceeding and to forthwith deposit the amounts so withheld or collected in a separate tax and trust account; and there shall also be deposited in such tax and trust account all required and authorized deductions for union dues, hospitalization and other trust purposes; and the deposit of said items and any other items that may be considered to constitute trust items shall be used and disbursed only for the particular purposes for which they are set aside.

10. Sufficient accurate books of account shall be maintained and kept at the debtor's-in-possession place of business within this District from which all business transactions and financial condition may be ascertained at any time during the pendency of this proceeding; as well as the wages and payroll deductions and all deposits into the Tax and Trust Account.

Order Continuing Debtor in Possession

11. In accordance with provisions of District Bankruptcy Rule XI-5, the debtor-in-possession shall file with the Referee:—

(1) a verified weekly statement of cash receipts and disbursements; with each verified weekly statement there shall be filed duplicate deposit slips showing all deposits into the Tax and Trust Account, also a weekly petty cash report with a list of all petty cash vouchers.

(2) A verified monthly report, not later than the 15th day of each month, which shall set forth a summary of the operations of the business during the preceding calendar month and shall show the amount of indebtedness incurred and remaining unpaid and contractual and other obligations assumed. This report may be in the form of a profit and loss statement but the detailed monthly inventory is hereby dispensed with until further order.

The monthly reports shall list the amounts and dates of payments of taxes transmitted by Federal Depository receipts. A copy of each report shall be transmitted promptly to the duly authorized representative of the creditors' committee.

12. Proper, necessary and adequate insurance shall be maintained to cover any and all loss and or damage to the property of the debtor including, but not limited to, general liability for damages to persons or property and policies for workmen's compensation and other statutory employees coverages. The amounts of such coverages may be determined and approved by the Official Creditors' Committee.

Dated at Jamaica, New York
March 27, 1970

/s/ S. D. WARNER
Referee in Bankruptcy

PROOF OF CLAIM OF
COPAL COMPANY LIMITED

JULIUS BLUMBERG, INC., LAW BLANK PUBLISHERS 71 BROADWAY AND 1 RECTOR ST., NEW YORK

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF NEW YORK

204

IN THE MATTER OF
FOTOCHROME, INC.
Debtor ~~Bankrupt~~

No. 70 B 209

FILED
OCT 22 1970
SHERMAN D. WARNER
Referee in Bankruptcy

STATE OF New York
COUNTY OF New York } ss.:

Masato Kasai
Copal Company Limited, International ~~of No.~~ Division, Shimura 2-16-20, Itabashi-ku, Tokyo, Japan ~~County of~~ ~~State of~~
~~in~~ being duly sworn, deposes and says:

1. (a) INDIVIDUAL

THAT he hereinafter designates himself as claimant (or as appears below)

(b) CO-PARTNERSHIP

That he is a member of
a co-partnership, hereinafter designated as claimant, composed of deponent and
of

and carrying on business at No.
County of State of (or as appears below)

(c) CORPORATION

That he is the President of Copal Company Limited
a corporation organized and existing under the laws of ~~the State of~~ Japan and carrying on business at ~~No.~~ Shimura 2-16-20, Itabashi-ku, Tokyo, Japan ~~in~~
~~County of~~ ~~State of~~ and is duly authorized to make this proof of claim on its behalf. Said corporation is hereinafter designated as the claimant.

2. That Fotochrome, Inc. Debtor ~~Bankrupt~~ the above named
was at and before the filing by ~~(or against)~~ said ~~Bankrupt~~ of the petition ~~for adjudication of Bankruptcy~~, and still is, justly and truly indebted (or liable) to claimant in the sum of $ 624,457.80, with interest at 6%
per annum from January 1, 1967 plus such amount, not exceeding $5000.00, as claimant shall pay on behalf of the said Debtor pursuant to the arbitration award hereinafter referred to as said Debtor's share of the expenses of arbitration.

~~3. That the consideration of said debt (or liability) is as follows:~~

3. That the consideration of said debt (or liability) is as follows: Breach of contract for purchase of cameras, dated April 25, 1966, and an arbitration award rendered September 18, 1970, as a result thereof.

~~goods, wares and merchandise sold and delivered to the said Bankrupt at the special instance and request of said Bankrupt at the agreed price and reasonable value set forth in the annexed statement which is made a part hereof.~~

4. That no part of said debt (or liability) has been paid, ~~except~~

5. That there are no set-offs or counterclaims to said debt (or liability), ~~except~~

6. That claimant does not hold, and has not, nor has any person by claimant's order, or to deponent's knowledge or belief, for claimant's use, had or received, any security or securities for said debt (or liability), ~~except~~

7. (If the debt or liability is founded upon an instrument of writing) That the instrument upon which said debt (or liability) is founded is attached hereto ~~(or is lost or destroyed, as set forth in the affidavit attached hereto)~~.

8. ~~(If the debt is founded upon an open account) That the said debt was (or will become) due on~~ ~~(or that the average due date thereof is~~ ~~), that no note or other negotiable instrument has been received for such account or any part thereof (or that the said debt is evidenced by a note (or other negotiable instrument), which is attached hereto), and that no judgment has been rendered thereon, except~~

Subscribed and sworn to before me this
15th day of October 1970.

COPAL COMPANY LIMITED,
International Division

By:

Rosemary McDermott
Notary Public or Commissioner of Deeds
ROSEMARY McDERMOTT
Notary Public, State of New York
No. 31-4011225
Qualified in New York County
Commission Expires March 30, 1971

7

POWER OF ATTORNEY ON REVERSE SIDE

14a

POWER OF ATTORNEY

To Thomas T. Hayashi, Daniel F. Callahan, Paul M. O'Connor, Jr. or representative: Carol Lyttle, Jr. James S. Morris, Terry C. Bridges and Robert B. Simms

The undersigned, Copal Company Limited, Shimura 2-16-20, Itabashi-ku, Tokyo, Japan

does hereby authorize you, or any one of you, with full power of substitution, to attend all meetings of creditors of the bankrupt aforesaid, and all adjournments thereof, at the places and times appointed by the court, and for the undersigned, and in the name of the undersigned to vote for or against any proposal or resolution that may be then submitted under the Act of Congress relating to bankruptcy, to vote for a trustee or trustees of the estate of the said Debtor and for a committee of creditors, to accept any arrangement or wage-earner's plan proposed by said Debtor in satisfaction of his debts, and to receive payment of dividends, and payment or delivery of money or of other consideration due the undersigned under such arrangement or wage-earner's plan, and for any other purpose in the undersigned's interests whatsoever; and with like powers to attend and vote at any other meeting or meetings of creditors, or sitting or sittings of the court, which may be held therein for any of the purposes aforesaid.

IN WITNESS WHEREOF, the undersigned has hereunto signed his name and affixed his seal, or caused these presents to be executed by a duly authorized officer, and its seal to be hereunto affixed, the 15th day of October 1970

Signed, sealed and delivered in the presence of

Copal Company Limited

(Corporate Seal) Harry S. Coplan

By [signature] (L.S.)

COPAL COMPANY LIMITED CORPORATE SEAL JAPAN

STATE OF
COUNTY OF } ss.: INDIVIDUAL

Acknowledged before me this day of 19

Notary Public or Commissioner of Deeds

STATE OF
COUNTY OF } ss.: PARTNERSHIP

On the day of 19 , before me personally came

to me known, who thereupon made solemn oath and acknowledged before me that he is a member of

the partnership in whose behalf he acts and in whose name he executed the foregoing instrument.

Notary Public or Commissioner of Deeds

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

CORPORATION

On the 15th day of October 1970, before me personally came Masato Kasai to me known, who being by me duly sworn, did depose and say that he resides in Tokyo, Japan that he is a duly authorized officer of the corporation on whose behalf he acts, to wit, the President of Copal Company, Limited the corporation described in and which executed the above instrument, that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

Rosemary McDermott
Notary Public or Commissioner of Deeds
ROSEMARY McDERMOTT
Notary Public, State of New York
No. 31-2611225
Qualified in New York County
Commission Expires March 30, 1971

No. 70 B 269

In the District Court of the United States
For the Eastern
District of New York

IN THE MATTER OF

FOTOCHROME, INC.

Bankrupt

IN BANKRUPTCY

Proof of Debt and Power of Attorney of

COPAL COMPANY LIMITED
(Name)

Shimura 2-16-20, Itabashi-ku
(P. O. Address)

Tokyo, Japan

Amount of Debt, $

AGREEMENT

THIS AGREEMENT made on the April 25, 1966 by and between the COPAL COMPANY LIMITED, a corporation organized and existing under the laws of Japan and having its offices at Shimuramachi 2-16-20, Itabashi-ku, Tokyo, Japan, hereinafter called COPAL and FOTOCHROME, INC., a corporation organized and existing under the laws of the States of Delaware, having its offices at 45-20 33rd Street, Long Island City, New York, United States of America, hereinafter called FOTO.

WHEREAS, FOTO has developed a still camera which incorporates therein certain unique elements, all of which are the subject of patent applications filed in Japan and other Countries of the world, the specifications of which are hereinafter more specifically referred to; and

WHEREAS, FOTO desires to retain the services of COPAL to manufacture and produce the FOTO Camera, its components and accessories, and COPAL desires to manufacture and produce said FOTO Camera, its components and accessories;

NOW, THEREFORE, in consideration of the mutual and dependent promises hereinafter set forth faithfully to be performed, the parties hereto agree as follows:

* * * *

IN WITNESS WHEREOF, the parties hereto have caused their respective representatives thereunto duly authorized to set their hands and seals hereto on the day and year first above written.

FOTOCHROME, INC.
A. A. KNOPF
A. A. Knopf, President

COPAL COMPANY LIMITED
M. KASAI
M. Kasai, President

ADDENDA

to

Agreement Dated April 25, 1966

by and between

COPAL COMPANY LIMITED

and

FOTOCHROME INC.

It is mutually agreed as follows that Article 16 be added to the aforesaid agreement to read as follows:

Payment made by FOTO to COPAL for FOTO cameras shall be done by irrevocable letter of credit. COPAL grants 150 days sight drafts and any difference caused thereby shall be borne by FOTO. All letters of credit shall be opened in the benefit of COPAL three (3) months prior to the shipments.

FOTOCHROME INC.

A. A. KNOPF
A. A. Knopf, President

COPAL COMPANY LIMITED

M. KASAI
M. Kasai, President

ARBITRATION AWARD

Cable Address:
"Arbitration"
Tel. (211) 4411, 4865

THE JAPAN COMMERCIAL ARBITRATION ASSOCIATION

THE TOKYO CHAMBER OF COMMERCE & INDUSTRY BLDG.
2-2, MARUNOUCHI 3-CHOME, CHIYODA-KU,
TOKYO, JAPAN.

17a
Branches:
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A W A R D

IN THE MATTER OF ARBITRATION

BETWEEN

COPAL COMPANY, LIMITED

AND

FOTOCHROME, INC.

COMMERCIAL ARBITRATION TRIBUNAL

THE JAPAN COMMERCIAL ARBITRATION ASSOCIATION

AWARD

IN THE MATTER OF ARBITRATION

BETWEEN

COPAL COMPANY, LIMITED

AND

FOTOCHROME, INC.

Petitioner: Copal Company, Limited
20-16, Shimura 2-chome, Itabashi-ku, Tokyo, Japan

Attorneys for Petitioner:

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Respondent: Fotochrome, Inc.
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Attorney for Respondent:

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In the matter of arbitration between the abovementioned parties, the undermentioned arbitrators examined and reviewed the statements and evidences submitted by the parties and did award as follows:

TEXT OF THE AWARD

Respondent shall pay to Petitioner a sum of US$624,457.80 equivalent to ¥224,804,808 together with an interest thereon at the rate of 6% per annum as from January 1, 1967 and until paid in full.

The other portion of Petitioner's claim shall be dismissed.

Respondent's claim against Petitioner shall be dismissed.

The expenses of arbitration proceedings shall be a sum of US$6,659.66 equivalent to ¥2,397,480, and Petitioner shall bear 10% thereof and Respondent shall bear 90% thereof. On the condition that Petitioner pay on Respondent's behalf the portion to be borne by Respondent, Petitioner shall be entitled to demand Respondent to repay such portion to Petitioner.

I. Petitioner's Claim and Evidences

Petitioner requested that an arbitration award should be rendered to the following effect:

(1) That Respondent pay to Petitioner a sum of US$631,501.13, equivalent to ¥227,340,407.00, together with an interest thereon at the rate of 6% per annum as from January 1, 1967 and until the said sum will have been fully paid; and

(2) That the arbitration expenses be borne and paid in entirety by Respondent.

1. As the Grounds for Petition Petitioner briefly stated as follows:

(1) Petitioner is a corporation established and existing under the Japanese Commercial Code, engaged in the business of manufacture and sales of shutters, photoelectric meters, cine-projectors, cameras and electronic machinery and tools, etc. Respondent is a corporation organized and existing under the laws of the State of Delaware, U.S.A., engaged in the business of sales and distribution of cameras, their components and accessories, etc.

(2) Petitioner and Respondent entered into an agreement on April 25, 1966 for Petitioner to manufacture a certain type of camera under the orders of Respondent and for Respondent to distribute and sell the same in the United States.

The said agreement was reduced into written document in Japan and was signed and became in effect on April 25, 1966. (hereinafter referred to as the "Agreement")

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(3) The Agreement contained a provision

stipulating the final settlement of any and all disputes that may arise between the parties out of or in relation to or in connection with the Agreement or breach thereof by arbitration to be held in Tokyo, Japan pursuant to the Arbitration Rules of The Japan Commercial Arbitration Association.

(4) The Agreement contained further provisions to the following effect:

(a) Based on specifications and drawings, attached to the Agreement and made part thereof, developed by Respondent, Respondent shall place an initial order for 250,000 sets of Foto Camera with Petitioner. Of the above 250,000 sets, Respondent agreed to issue and issued a confirmed order for 75,000 sets of Foto Camera to be delivered to Respondent by Petitioner during a period of nine months from June, 1966, to February, 1967, both inclusive, at the unit price of US$13.26.

(b) The payment for the above stated Cameras was to be made by Respondent with the Irrevocable letter or letters of credit to be opened three months in advance prior to the shipment in favor of Petitioner as the beneficiary.

(c) It was agreed in the Agreement that Respondent shall provide Petitioner with all of the molds, tools, dies, jigs and other machines that Petri Camera Co., Ltd. (hereinafter referred to as "Petri"), an ex-party had possessed and used for the production of Foto Camera under an agreement that Respondent had made with Petri prior to Petitioner's entering the Agreement and, further,

that any expenses necessary for the repair, correction or alteration to those molds, tools and fixtures so as to make them usable for Petitioner's production system should be entirely undertaken and paid by Respondent.
In addition to the said expenses, Respondent agreed to undertake all expenses necessary for Petitioner to newly make additional tools, etc. as long as they are necessary in the manufacturing of Foto Camera.

(d) Petitioner agreed to purchase from Petri all of the parts that Petri had in its possession at such a cost as would have been necessary for Petitioner in manufacturing the same of the same quantity (the said cost to be hereinafter referred to as "Copal's Cost"), and to make payment of Copal's Cost to Petri in such an amount as Petri would charge against Respondent, on condition, however, that should the total of Petri's bill therefor exceed the Copal's Cost, the excess shall be paid to Petitioner by Respondent and that in case the total billed amount is less than the Copal's Cost, the difference shall belong to Petitioner.

(e) In the event of a breach of the Agreement by either party resulting in damages to the other party, that other party may terminate the Agreement and recover from the party so breaking the Agreement such damages as may be sustained.

(5) After receiving from Petri by around the end of May, 1966, delivery of molds, tools, dies, jigs and fixtures, Petitioner

had to spend the total of US$6,413.28 in the repair of these molds, etc.

(6) In addition to the above, Petitioner had to and did manufacture the following molds, dies, tools, jigs, etc. which were all necessary for manufacturing Foto Camera in accordance with the Agreement and disbursed the following expenses totaling equivalent to US$32,881.27, namely:

a) Jigs, tools, etc.:	¥3,467,350
b) Dies:	7,724,376
c) Fixture:	645,530
Total:	¥11,837,256
	(US$32,881.27)

(7) Petitioner received delivery from Petri of certain parts of Foto Camera by around the end of May, 1966 and made ¥18,487,702 payment therefor to Petri. The Copal's Cost of those parts being, according to the calculation Petitioner made, ¥16,231,137, Respondent should pay to Petitioner the difference in the amount of ¥2,256,565 equivalent to US$6,268.24, which is the amount paid by Petitioner to Petri less the Copal's Cost.

(8) Although Respondent had opened an irrevocable letter of credit covering the amount of US$255,918.00 for 19,300 sets of cameras on May 2, 1966, it failed to open another letter of credit thereafter. Petitioner requested Respondent to open a letter of credit by

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cables and letters and by having the Representative of Petitioner visit Respondent at the latter's office in New York. But Respondent never opened any further letter of credit.

Under the circumstances, Petitioner sent a notice dated December 22, 1966 by a registered airmail post advising Respondent that the Agreement between the parties be terminated due to the default on the part of Respondent and that Petitioner intended to demand payment of the damages thereby caused to Petitioner.

According to the provision of Paragraph 1) of Article 9.00 of the Agreement, a notice sent under the Agreement by registered airmail is deemed to have been served upon the addressee at the expiration of seven days after it is posted.

Therefore, the notice of termination of the Agreement that Petitioner sent to Respondent on December 22, 1966 is deemed to have been served upon Respondent on December 29, 1966 and the Agreement was accordingly terminated as of that date.

(9) Petitioner sustained damages caused by the said defalut on the part of Respondent amounting to the equivalent sum of US$585,938.34, as follows:

(a) Total 75,000 sets of Foto Camera were to be supplied to Respondent by the end of February, 1967. Accordingly, Petitioner had either manufactured or purchased, by the time

when the above notice of termination of the Agreement was sent out, the following complete sets of Foto Camera, semi-assembled cameras and the materials for Foto Camera, amounted to the equivalent sum of US$492,538.60, all of which are presently still held by Petitioner.

The Foto Camera is a specially designed camera for which special roll film can be used as printing paper, and the black and white or color positive print can be produced directly by developing the film. The shape and the structure of the camera is unique and special. Due to this, the parts and materials for Foto Camera are unable to be used for manufacturing cameras of other types.

Furthermore, the special film to be used for Foto Camera is controlled by the patent right that Respondent has and is being manufactured by ANSCO, an ex-party, which supplies the film exclusively to the user of Foto Camera only and is therefore not available in general market. In other words, Foto Camera is a camera unsaleable or unmarketable unless the above stated special film is supplied. Due to this, the expenses incurred by Petitioner in the manufacture and purchase of those cameras, parts and materials became the total loss of Petitioner.

12,283 complete sets at unit price $13.26 (including Petitioner's profit) as provided in the Agreement	$162,872.58
Semi-assembled parts at original cost	$311,637.30
Materials at original cost	$18,028.72
Total:	$492,538.60

(b) Of the above stated 75,000 sets under the confirmed order from Respondent, only 19,300 sets were delivered. From the balance of 75,000 sets less 19,300 sets, total 12,283 sets of complete cameras referred to in (a) above are further deducted. With respect to the balance of 43,417 sets, Petitioner could have made profit of $1.989 per set (which is 15% of the unit price $13.26), or, total $86,356.41, which Petitioner had to lose and lost.

(c) During four months period, October, 1966 through January, 1967, Petitioner paid to Sekonic Co., Ltd. storage charge of total $4,043.33 at the rate of ¥2,500 per tsubo per month for the total storage space of 145.56 tsubo (481.19m^2) where the complete sets of Foto Cameras, semi-assembled parts and the materials stated in (b) above were stored.

(d) Also, Petitioner had to and did send Masato Kasai, its Representative Director and Tsugio Utada, Foreign Trade Deaprtment Chief to New York in order to have Respondent perform its obligation to open the letter of credit. The trip of these two persons to New York cost Petitioner total $3,000.00 expense, $2,000.00 being the travel expenses and another $1,000.00 staying expenses for 10 days ($50.00 per capita per day).

(10) To sum up, the repair charges of $6,413.28, the manufacturing expenses of $32,881.27, the difference of $6,268.24 and damages of $585,938.34, namely, grand total $631,501.13 are the amount Petitioner should be entitled to demand payment from Respondent together with an interest thereon at the rate of 6% per annum from January 1, 1967 up to the time when the said total amount will have been fully paid.

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2. Petitioner's Answer to Respondent's Statement against Grounds for Petition:

(1) Petitioner admits the fact that it received the payment for 19,300 cameras which were delivered to Respondent by Petitioner, and denies the Respondent's statement that the obligation of Petitioner to perform did not ripen until Respondent furnished Petitioner with letter of credit.

Provisions stipulated in the addenda to the Agreement regarding the opening of the letter of credit was nothing but the provisions stipulating merely the method of payment of the purchase price of the cameras for which the above mentioned confirmed order was given to Petitioner by Respondent. Respondent's obligation as buyer to purchase cameras from Petitioner did definitely arise with respect to the abovestated 75,000 sets of cameras upon and by signing the Agreement and the said obligation on the part of Respondent was not dependent on the letters of credit to be opened from time to time and only with respect to the number of sets to be specified in the letters of credit.

Petitioner purchased or assembled complete sets of cameras, semi-assembled parts of cameras and materials which Petitioner had indicated in (9), (a) of the Ground for the Petition, all within and following the confirmed order for 75,000 sets of cameras from Respondent. Therefore, all the costs stated in (9) of the Ground for the Petition should have been borne by Respondent as provided in the Agreement. In other words, the said costs are the losses and damages normally caused due to Respondent's nonperformance of its obligation and Respondent is liable for making compensation to Petitioner.

It naturally follows that purchasing of parts or materials, or assembling of parts or cameras which are necessary to manufacture cameras not covered by the existing letter of credit but included in the confirmed order, should be always prepared in advance. If prior purchase and preparation are not permitted, it would no doubt be a serious problem upsetting the operation of Petitioner's manufacturing schedule. It is, therefore, Petitioner's obligation to make arrangements so that Petitioner can punctually ship ordered cameras. Respondent has no right to restrict such obligation in spite of no provision in the Agreement. It is justified that, until the Agreement is terminated, Petitioner has manufactured cameras up to the quantity of the confirmed order and has purchased parts or materials.

Petitioner, therefore, contests Respondent's statement that Petitioner was in default in the performance of its obligations under the Agreement.

(2) Petitioner denies Respondent's statement that because of Petitioner's failure to meet its contractual obligation, Respondent informed Petitioner that Respondent would not proceed further under the Agreement until Respondent had received from Petitioner the entire 19,300 cameras for which Respondent had already paid, thereby terminating the Agreement.

At time when Masato Kasai, Petitioner's representative met and had a talk with L. O. Brown, who was agent for A. A. Knopf, Respondent's representative, at the latter's office in New York on or about September 19, 1966 and in Köln on or about October 6 and 8, 1966, that Petitioner's representative requested that the letter of credit be immediately opened, Respondent reassured on

each occasion that letter of credit would be opened within a few days. At no time whatsoever during those talks on those occasions, cancellation or termination of the Agreement was ever discussed, nor was such ever talked about.

(3) Petitioner denies Respondent's statement that Petitioner failed to perform its obligation to deliver cameras at the time and in the quantity set forth in the delivery schedule provided in the Agreement.

While Petitioner admits that there is cuh a provision on delivery schedule in the Agreement as Respondent asserts, the Foto equipment and parts were not delivered to Petitioner by May 25, 1966. The delivery of those equipment and parts to Petitioner commenced on or about May 10, 1966 and took approximately 20 days to complete. Petitioner admits that, due to the undermentioned reasons on which Petitioner was not liable, there is delay in delivery of cameras as Respondent asserts. Petitioner made shipments of total 19,300 sets of cameras during from June to the end of September, 1966 as follows:

June, 1966	200 sets	By Air Transportation
July, "	3,350 "	"
August, "	6,800 "	By Sea Transportation
September, "	8,950 "	"
Total	19,300	

Defference between the above shipment times and the monthly schedule does not constitute any breach of the Agreement. The reasons are as follows:

(a) The monthly delivery schedule set forth in Article 3.03 of the Agreement was after all nothing but Petitioner's program of delivery of total 75,000 cameras to Respondent,

which was not Petitioner's contractual obligation vis-a-vis Respondent. Petitioner's contractual obligation in reference to the delivery time of 75,000 Foto cameras, was to complete the delivery of 75,000 cameras in its entirety by the end of February, 1967, and no more obligation than that.

Both parties came to a definite understanding that even if the delivery was delayed in respect to the monthly schedule, such a delay never shall be a cause to make Petitioner liable for Respondent's any damages, if there might ever arise such. The latter half of the same Article 3.03 of the Agreement is by itself another evidence that clearly shows the above statement of Petitioner to be the fact and the truth.

Petitioner is not reluctant to admit as true the fact that Petitioner did not deliver 75,000 cameras by the end of February, 1967, but this turned out to be the reality as the result of Respondent's breach of the contract, his failure in opening letters of credit and never due to anything for which Petitioner is responsible.

(b) The major reasons for Petitioner's having been unable to manufacture cameras in accordance with the monthly schedule described in the Agreement were as follows: Therefore, the delay in production was never caused by any responsibility of Petitioner but entirely resulted from the cause on the part of Respondent.

i) Delivery to Petitioner from Petri of molds, tools and jigs and parts, etc. was much delayed.

ii) The Drawings, specifications and the inspection standard necessary for the production of cameras were not delivered to Petitioner from Petri.

iii) The parts that Petitioner received from Petri were of very inferior quality, to which the deficiency in the original composition was added in aggravating the difficulty on the part of Petitioner and the composition plan had to be changed many times and the parts had also to be remolded several times.

iv) The molds, tools and jigs, which Petitioner received from Petri were all in very bad quality condition and upkeeping. Not only that, many molds, jigs and tools all indispensable for the manufacture of the cameras were missing and Petitioner never received their delivery from Petri.

(c) Petitioner sent to Respondent detailed reports, many times, regarding the inferior quality of the goods delivered from Petri and regarding the delay in production of cameras as scheduled monthly in the Agreement that would inevitably have sequenced, about which Respondent agreed to and raised no objection. In particular, the closest contact to Respondent was made as to how to improve the technical defects that Petitioner found out in the cameras. The improvements were made by keeping close contact and having discussions with Respondent's Tokyo Agent, Kazutoshi Naito, and Respondent was fully well aware of what improvement was required and how the improvement work went on.

(d) Petitioner contests all against the existence and the amount of losses and damages allegedly suffered by Respondent due to Petitioner's breach of contract. Therefore, Petitioner argues against the offset of the abovementioned claim alleged by Respondent to Petitioner's claim under the present arbitration.

(e) Petitioner refutes against Respondent's statement in (6) of 3. undermentioned as follows:

It was a natural premise of Article 2.04 of the Agreement that the molds, tools and jigs, etc. to be delivered to Petitioner should have been of the quality usable for manufacturing the cameras under the Agreement.

Nextly, Article 2.04 of the Agreement did not presuppose any repairs to the molds, jigs and tools, etc. because of thier poor and bad quality or any unlimited repairs. The possible repairs that the Agreement presupposed to be made to the molds, etc. were the repairs that might be "necessary" for making the molds, etc. fit to Copal's production system.

Article 3.03 and Article 3.02 of the Agreement when construed properly, should lead us to a conclusion that the delivery of drawings from Respondent to Petitioner had been included in the Respondent's delivery obligation stipulated in Article 3.03.

Furthermore, examining the whereas clauses and Article 1.01 of the Agreement, we clearly notice that it had been contemplated by the parties to this Agreement that Foto camera was a camera technically completed by Respondent as a still camera, that Respondent was to deliver to Petitioner specifications and drawings necessary for manufacturing Foto camera, and that Petitioner was to manufacture Foto camera according to the specifications and drawings, but that neither party to the Agreement had ever contemplated or ever thought that Petitioner was to make very special efforts in the development of Foto camera so as to complete the Foto camera as a merchandisable camera.

In support of the foregoing statement, Petitioner produced Exhibits A-0-1 and 2, Exhibits A-1 through A-15, Exhibits A-16-1 and 2, Exhibits A-17 through A-19, Exhibits A-20-1 and 2, Exhibit A-21, Exhibit A-22, Exhibits A-23-1 and 2, Exhibits A-24-1 and 2, Exhibits A-25-1 and 2, Exhibits A-26-1 and 2, Exhibits A-27-1 and 2, Exhibits A-28-1 and 2, Exhibits A-29-1 and 2, Exhibits A-30-1 and 2, Exhibits A-31-1 and 2, Exhibits A-32-1 and 2, Exhibits A-33 in English and in Japanese, Exhibits A-34 through A-36, Exhibits A-37-1 and 2, Exhibits A-38-1 and 2, Exhibits A-39-1 and 2; and invoked the testimonies of Witnesses Keiji Takemoto, Shozo Takahashi, Ryoji Fujino, Masao Mato, Kazutoshi Naito and Masato Kasai. Petitioner made clear its position that it admitted the execution of each of Exhibit B-1 and Exhibit B-2.

II. Respondent's Answer and Assertions against Petitioner's Assertions and Answer aforementioned.

1. Respondent's Answer to Petitioner's Claim.

Respondent requested that an arbitration award should be rendered to the following effect:

(1) That the claim of Petitioner is dismissed; and

(2) That Petitioner pay to Respondent the expenses incurred by Respondent in connection with this arbitration proceedings.

2. Respondent's Answer to Petitioner's Ground for Petition.

(1) Respondent admits that Petitioner is a corporation as Petitioner asserts and that Respondent is an American corporation as Petitioner asserts.

(2) Respondent does not contest that Petitioner and Respondent

entered into the Agreement on placing orders for and manufacturing and selling of, a certain type of cameras as Petitioner asserts; that the date of coming into effect of the Agreement was April 25, 1966; that the Agreement contained as its Article 12:00 a provision stipulating the final settlement of any and all disputes that may arise between the parties out of or in relation to or in connection with the Agreement or breach thereof by arbitration to be held in Tokyo pursuant to the Arbitration Rules of The Japan Commercial Arbitration Association; and that the Agreement contained among others the provisions as Petitioner states in 1, (4), (a) through (e) of Petitioner's Claim and Evidences. Respondent, however, asserts that, in case Petitioner pay for repair of molds, etc. delivered by Petri, Respondent should have repaid up to a sum of US$10,000.00 to Petitioner and Petitioner should have borne any sum exceeding US$10,000.00.

(3) Respondent denies that Petitioner spent a sum in Japanese currency equivalent to US$6,413.28 in the repair of molds, etc. which Petitioner had received from Petri by around the end of May, 1966; that Petitioner newly manufactured the molds, dies, tools, jigs, etc. which were all necessary for manufacturing Foto camera in accordance with the Agreement and disbursed a sum in Japanese currency equivalent to US$32,881.27; and that the sum of ¥2,266,265 is the difference between the sum which Petitioner paid for certain parts of Foto camera which Petitioner received from Petri by around the end of May, 1966 and the Copal's Cost of those parts according to the caluculation Petitioner made.

(4) While Respondent admits that Respondent opened an irrevocable letter of credit covering a certain amount for 19,300 sets of cameras and that Respondent did not open any other letter of credit in Petitioner's favor thereafter, Respondent contests that Petitioner visited the Respondent's office to request the latter to open a letter of credit and that, because of Respondent's failure to meet such request, Petitioner terminated the Agreement. Respondent further contests that Petitioner sustained damages caused by the default on the part of Respondent amounting to a total sum of US$585,938.34.

(5) Respondent argues that Petitioner shall not be entitled to the damages as it enumerated in Petitioner's Request for Arbitration.

3. Respondent's Statement against Petitioner's Ground for Petition (Plea)

(1) There was an addenda to the Agreement, which stated that Respondent would open letters of credit in Petitioner's favor, three months before shipment. Therefore, the obligation of Petitioner to perform did not ripen until Respondent furnished Petitioner with letter of credit in accordance with the foregoing. Accordingly, even if Petitioner purchased any parts or assembled any parts or cameras not covered by the then existing letter of credit, there is no cause on which Respondent is responsible for default in connection thereof. Any such purchase or assembly by Petitioner was at the risk of Petitioner, not at the risk of Respondent. The 19,300 cameras covered by the letter of credit opened by Respondent on May 2, 1966 have been delivered to

Respondent, and Petitioner has been paid the entire agreed purchase price of those cameras. As a result, Petitioner is not entitled to recover from Respondent any expenses which Petitioner may have incurred in purchasing parts or in assembling parts or cameras, including all such costs itemized in Item (a) and (b) of Paragraph (9) of Petitioner's Ground for Petition (Paragraphs 2 through 4 of Part IV of Petitioner's Request for Arbitration).

Moreover, since it is apparent that Petitioner was in default in the performance of its obligations under the Agreement almost from its inception, Respondent could have terminated the Agreement at any time so that for that reason also said purchase and assembly was at the risk of Petitioner.

(2) Because of Petitioner's failure to meet its contractual obligation to Respondent as described hereafter, Respondent on or about September 6, 1966 informed Petitioner that Respondent would not proceed further under the Agreemnt until Respondent had received from Petitioner the entire 19,300 cameras for which Respondent had already paid by means of a letter of credit, thereby terminating the Agreement because of the said breach of its terms by Petitioner. Accordingly, Petitioner is not entitled to recover the amount of any expenses which it may have incurred in purchasing any parts or in assembling any parts or cameras after it received the aforesaid notice from Respondent.

(3) Petitioner's failure to deliver cameras to Respondent in accordance with the delivery schedule set forth in the Agreement was a breach of Petitioner's contractual obligation to Respondent.

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(a) The Agreement states that provided Foto equipment and parts (as listed in the Agreement) were delivered to Petitioner by May 25, 1966, Petitioner would deliver the said 75,000 Foto camera according to the following schedule:

June, 1966	2,000 cameras
July, 1966	4,000
August, 1966	7,000
September, 1966	10,000
October, 1966	11,000
November, 1966	11,000
December, 1966	10,000
January, 1967	10,000
February, 1967	10,000
	75,000 cameras

The Foto equipment and parts were delivered to Petitioner by May 25, 1966.

(b) Petitioner fully failed to deliver the initial confirmed order of 75,000 cameras in accordance with the schedule set forth in the preceding paragraph.

On June 20, 1966 Petitioner wrote to Respondent stating that the number of cameras shippable during the month of June, 1966 was estimated to be far lower than the number called for by the said delivery schedule. On June 30, 1966 Petitioner wrote to Respondent stating that Petitioner was shipping the first 200 cameras on that date, that 300 additional cameras would be shipped within a few days of that date, and that Petitioner had developped a firm prospect for minimum production of 6,000

cameras in the month of July, 1966 and 9,600 cameras in the month of August, 1966. On July 4, 1966 Petitioner wrote to Respondent stating that Petitioner would be able to ship 15,000 cameras per month beginning in the month of September, 1966.

(c) Despite these assurances by Petitioner, Respondent in fact received cameras only in accordance with the following schedule:

June, 1966	0
July, 1966	1,400
August, 1966	2,150
September, 1966	6,800
October, 1966	8,950
Total	19,300

(4) As a result of Petitioner's said breach of the Agreement, Respondent sustained the following damages:

(a) U.S.$20,000 as liquidated damages for late delivery of 19,300 cameras; and

(b) U.S.$70,000 in wasted advertising; and

(c) U.S.$738,582 representing lost profit of U.S.$ 13.26 on each of the 55,700 cameras which were included in the initial confirmed order of 75,000 cameras and which were never delivered to Respondent by Petitioner; and

(d) Interest on the said amounts at the rate of 6% per year for the period from January 1, 1967 to the date on which the said amounts are fully paid; and

(e) The entire costs incurred by Respondent in connection with this arbitration proceeding.

(5) Respondent, therefore, submits the aforesaid damages in the preceding paragraph for its offset in an equal amount to Petitioner's claim, even if the said claim is partly permitted.

(6) Respondent's statement against Petitioner's statement in (3) of 2.

(a) Petitioner's statement that February, 1967 was "the agreed delivery time" of the entire 75,000 cameras is wrong.

In fact, the cameras were to be delivered in accordance with schedule set forth in Article 3.03 of the Agreement, and February 1967 was the time when the last delivery was to have been made.

(b) The Agreement does not presupoose that the materials, which Respondent was required to deliver to Petitioner, were of any particular quality whatsoever.

At the same time, Article 2.04 of the Agreement makes it abundantly clear that the parties recognized the possibility that some repair or replacement work would be necessary before the Foto equipment and parts could be used for manufacturing cameras under the Agreement. The Agreement clearly obligated Petitioner to meet the delivery schedule of Article 3.03 regardless of any need for repairs or replacements of the Foto equipment.

Moreover, the delivery of adequate drawings, specifications or inspection standards was not a condition on Petitioner's responsibility to meet the delivery schedule contained in Article 3.03 of the Agreement. Also, in connection with any necessary changes in specifications or drawings, Article 2.03 of the Agreement contemplates the necessity of such changes and places on Petitioner the responsibility for making them.

(c) By no means did Respondent in any way agree to surrender or waive any rights which it may have had in connection with any delay in production of cameras on the part of Petitioner.

(7) Respondent informed M.A. Braun, Attorney for Respondent by cable dated March 31, 1970 that, upon its application for the reorganization of Respondent, Respondent had received from the referee in bankruptcy an order of the reorganization court to the effect that the present arbitration proceedings should be stayed (Respondent's cable to Attorney Braun to the same effect was dated April 3, 1970). Attorney for Respondent has not appeared in the arbitration proceedings held thereafter for the reason that he received the court order to stay the present arbitration and he had been notified that, therefore, his representation of Respondent had been terminated, submitting before the arbitrators Respondent's cables each dated April 7, April 7 and April 8, 1970 to the same effect.

In support of the foregoing statement, Respondent produced Exhibit B-1 and Exhibit B-2 and moved that A. A. Knopf and L. O. Brown be summoned as witness. These witnesses, however, were never produced and have not appeared in the arbitration proceedings. Respondent made clear its position that it denies Exhibit A-17 and it admits the rest of Petitioner's documentary evidences.

III. Arbitrators' Award

1. Respondent stated in its Answer dated July 31, 1968 against Petitioner's claim in this arbitral proceedings that Respondent has against Petitioner a counterclaim of ¥334,800,000 and an interest thereon plus arbitral expenses and that the said claim of Respondent should be approved as payable by Petitioner and further that Petitioner's claim should be set off by the said counterclaim of Respondent.

The Japan Commercial Arbitration Association requested Respondent to pay the administrative fee on the said counterclaim of Respondent but Respondent has failed to pay the fee into the Arbitration Association by the closing of the hearing.

We Arbitrators therefore have deliberated on the problem whether Respondent's such a counterclaim under such circumstances as seen in the above should be heard by the Arbitrators. The Commercial Arbitration Rules of the Arbitration Association contain no provisions to regard a claim of a party to the arbitration who does not pay the administrative fee as an invalid claim or to the effect that a party to the arbitration not paying the administrative fee may be thereby subjected to an unfavorable award. Therefore, it should be appropriate for the Arbitrators and it is so held by us that the Arbitrators should hear and

give their judgement to such a claim of Respondent along with the hearing and adjudication of Petitioner's claim. We shall review both of the claims as alleged by both parties respectively as follows:

2. The following facts are not disputed between the parties; both Petitioner and Respondent are the corporations as alleged by Petitioner; they entered on April 25, 1966 into an agreement whereunder Petitioner manufactures and exports to the orders of Respondent cameras of certain type (hereinafter "Foto camera") for sale by Respondent in the United States; the said agreement contained such provisions as stated by Petitioner in its statement. Paragraph 4. (a) through (e): Respondent opened on May 2, 1966 an irrevocable letter of credit for the initial payment under the said agreement of $255,918 covering the price for 19,300 sets of Foto camera; however, thereafter the second or any further letters of credit were never opened; Petitioner and Respondent agree, in the agreement, on the shipment schedule of the finished Foto camera as follows: Namely, 2,000 sets in June, 1966, 4,000 sets in July, 1966, 7,000 sets in August, 1966, 10,000 sets in September, 1966, 11,000 sets in October, 1966, 11,000 sets in November, 1966, 10,000 sets in December, 1966, 10,000 sets in January, 1967 and 10,000 sets in February, 1967, total 75,000 sets; however, the delivery was not made so smoothly as was above scheduled but only 19,300 sets were delivered from Petitioner to Respondent by the end of October, 1966.

3. Respondent's orders for the manufacture and delivery of Foto camera had originally been placed by Respondent with Petri Camera Co., Ltd. which is a third party outside of the arbitration (hereinafter "Petri") but the manufacture and delivery did not go on according to the scheduled plan and Respondent having been dissatisfied with the situation terminated the agreement with Petri before the agreement at issue before his arbitration (hereinafter "Original Agreement") was entered between Respondent and Petitioner substituting Petitioner as manufacturer and seller for Petri, at which time negotiations were held between the representatives of both parties arriving at an agreement that Petitioner take delivery from former contractor Petri of parts of cameras, molds, tools, dies, jigs, etc., which Petri then had in its possession, required for the manufacture of cameras to the order of Respondent at such terms and conditions as both parties then agreed upon. The molds, tools, dies, jigs, etc. that Petitioner received from Petri according to the agreement were, however, very much inferior in quality and in thier conditions and much had to be done by Petitioner in the repair and improvement to them. Not only that but also the delivery of them to Petitioner took unexpectedly much time. Due to such circumstances, shipment to Respondent of cameras for Petitioner was unable to perform in accordance with what had been agreed upon between the parties and the delivery of cameras to Respondent became a little delayed gradually. On the part of

Petitioner, however, at each time, notice was given to Respondent in writing setting forth in details the reason for delay in the delivery as well as the quantity of cameras that Petitioner expected to be able to deliver to Respondent so as to keep Respondent informed of and to get him to understand the development. Also, Petitioner kept in contact with and got approval of Kazutoshi Naito, who was charged by Respondent to be responsible for the quality control of cameras to be manufactured in Japan and for supervising the delivery of cameras in accordance with the scheduled plan of delivery. The Original Agreement between Petitioner and Respondent called for delivery of 75,000 sets of Foto camera according to the orders of Respondent not later than the end of February, 1967 and should Petitioner be in default in deliverying the said quantity by the said time, Petitioner was to be held responsible for the non-performance of its obligations but the penalty to be imposed upon Petitioner in such an event was agreed upon to the extent of $4.00 per set and maximum $20,000. The situations being found as have been such, Petitioner cannot be said to have been in default in performing its contractual obligations in whatever sense it may be.

The above facts are all found true by Exhibits A-0-1 and A-1 and testimonies of Witness Keiji Takemoto and Witness Kazutoshi Naito.

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4. Against Petitioner's above contention, Respondent argues stating that Petitioner did not carry out shipments of cameras in accordance with the terms of the Original Agreement which stipulated the delivery time and numbers of sets of cameras to be delivered every month during June, 1966 and February, 1967 and in spite of Respondent's request made in accordance with the said agreed schedule of shipment for the delivery of cameras. Furthermore, Petitioner later informed Respondent of the change to the shipment schedule by advising Respondent of the changed numbers of sets of cameras to be shipped by stating that the changed schedule was surer and more realistic than before the change but again Petitioner did not perform the shipment under the revised schedule of his own. The total number of cameras delivered by Petitioner to Respondent until October 31, 1966 was merely 19,300 sets and no further delivery was ever made. This is a clearcut violation by Petitioner of the contractual obligations on its part to be performed. Petitioner cannot be justified in asserting that Respondent be responsible for breach of contract and for the compensation of damage inasmuch as it is Petitioner who is in default which Petitioner sets aside. Respondent made its intention clear to Petitioner by a written notice advising that no further letters of credit for the shipment of the remainder of the cameras would be established on behalf of Petitioner until Petitioner completed delivery of cameras equivalent to the full

amount of the letter of credit already opened, and Respondent gave Petitioner on September 6, 1966 a notice to terminate the agreement on the ground of the breach thereof that Petitioner had committed by that time. Therefore, Respondent should be relieved of any of its obligations even assuming arguendo that Respondent might have been responsible for non-performance of the agreement after the said notice of termination of the agreement.

The fact that Respondent gave Petitioner a written notice of intention to terminate the agreement, is alleged by Respondent but is not established by Exhibit B-1 which Respondent submitted before us, but even if the said fact had been proved it would be alone insufficient to establish that Petitioner was in fact in default of performance of its obligations under the Original Agreement. Instead, it is found on the basis of Exhibit A-0-1 and A-0-2, testimonies of Witness Keiji Takemoto and Witness Kazutoshi Naito, referred to above , that the delivery to Petitioner from Petri of tools, jigs and parts of cameras, all indispensable for the manufacture of cameras under the agreement, was delayed due to various unavoidable reasons; causes for the delay in the delivery were those which were far different from what Petitioner had been told about by Respondent in the beginning; many of them required either much troublesome repair work to be done or to be procured anew, all of which contributed to the inevitable delay in the shipping schedule originally made. However, Petitioner did advise Respondent in writing of such problem at each time when it took place so that Respondent would understand the events

that took place and Respondent made no specific protest to the delay in the shipment; Petitioner also sent detailed reports in writing describing the repair work done, the purchases additionally made and the expenses required therefor both to Respondent and to Kazutoshi Naito, designated agent of Respondent and obtained his approval of the necessary expenses so disbursed as well as of the above stated situations as they developed; therefore, the said delay should not be held as having constituted any non-performance by Petitioner of its obligations but, instead, if 75,000 sets of cameras could be delivered not later than the end of February, 1967 as provided for in the Original Agreement, that was all that Petitioner had to do and it should be fair to hold that Petitioner's obligation to effect the shipments precisely in conformity to the shipment schedule earlier than the end of February, 1967 was not stipulated strictly in the Original Agreement.

These circumstances are established by Exhibits A-O-1 and A-O-2, testimonies of Witnesses Keiji Takemoto and Kazutoshi Naito. Exhibit A-O-2 further shows that Respondent was, under the Original Agreement, obligated during through the entire period of the said agreement to open on bahalf of Petitioner irrevocable letters of credit payable 150 days after sight always three months prior to the scheduled shipment day in an amount equivalent to the price of the sets of cameras manufactured and shipped by Petitioner, which leads us to a conclusion that in the event Respondent does not observe its said obligation Petitioner was not obligated to

ship cameras to Respondent in excess of the quantity that should be shipped under the letter of credit then already opened by Respondent. But the situation that actually turned out to be the case was that Petitioner requested Respondent to immediately open letters of credit so that Petitioner could make shipments of cameras which Petitioner continued to manufacture but Respondent did not open the letters of credit in compliance with Petitioner's request and Petitioner cancelled the Original Agreement for that reason, which cancellation of the agreement by Petitioner should be said to have been just and proper for it to do.

In so far as the cancellation by Petitioner of the agreement was because of Respondent's failure to perform its obligation, as demonstrated in the foregoing, these cameras which Petitioner had already manufactured or which had already been in process for the manufacture as at the time of the cancellation of the agreement should be said to have been the products or products-to-be that should be delivered to and accepted by Respondent under the Original Agreement and Petitioner having been entitled to the payment by Respondent for the products should be entitled to claim compensation of damage sustained by the nonperformance by Respondent of its obligation.

Furthermore, inasmuch as Respondent was under obligation to take and accept delivery 75,000 sets of cameras by the end of February, 1967, it naturally follows that it was nothing but Petitioner's obligation to make necessary preparation by every

possible precaution for the manufacture and delivery in full of cameras in the quantity and by the delivery date respectively agreed upon and further that, accordingly, should Petitioner's such preparation for the manufacture and delivery have to be stopped due to the cancellation of the agreement because of Respondent's non-performance, Petitioner should be said to have suffered damage equal to the price of the products already manufactured and half-manufactured by the time of the cancellation of the agreement, which price should include Petitioner's reasonably obtainable profit. Not only that, but those parts that were not yet processed for manufacturing cameras should, as far as they were the parts necessary for the manufacture of cameras, result in the loss of Petitioner unless they could be used for some other purposes. With respect to those cameras other that Petitioner could have sold and delivered to Respondent than the manufactured and half-manufactured ones referred to above, Respondent should be responsible for compensating damage caused to Petitioner by inability to sell the same to Respondent due to cancellation of the agreement.

5. As we have seen in the above, the agreement between the parties had stipulated the shipment dates and the number of the sets of camera to be shipped, but the said shipment dates and the number of the sets of camera were so arranged between the parties on an assumption that matters that had been anticipated by both parties as to the time required by Petitioner for the preparation

before commencing the manufacture of cameras and as to the details of the preparation would move onward smoothly whereas various kinds of the instruments and the parts etc. necessary for the manufacture of cameras of which Petitioner took delivery from Respondent's former contractor Petri were found, upon taking delivery, to have been either of such defective nature that could not be thought of or of unexpected difficulties arising and the commencement of the manufacture delayed the sequence of which was the delay in the shipments scheduled in the beginning.

Letters sent from Petitioner to Respondent (Exhibits A-6, A-7 and A-8 through A-14) coupled with the testimonies of the Witnesses (Keiji Takemoto, Shozo Takahashi and Kazutoshi Naito) clearly indicate that the above finding is all ture and correct. Respondent has raised no objection or protest to the said delay in the shipments but instead Respondent rather approved it though it might have felt dissatisfied.

On the part of Petitioner, though there being more or less a delay, Petitioner was not only gradually catching up the initial schedule of the shipments but was equipped ready for the delivery of more quantity than originally scheduled. Such having been the case, letters of credit should have been opened by Respondent three months in advance and in the sums sufficient to cover the quantity to be shipped one shipment after one shipment. Petitioner should be said right in having requested Respondent to open the letters of credit and Respondent's notice unilaterally

given on Respondent's own volition to Petitioner advising that no further letters of credit would be opened until total quantity of cameras fully corresponding to the sum that appeared on the letter of credit already opened cannot be said to have been the proper exercise of his lawful right under the agreement. Petitioner's additional request for the opening of the letters of credit and cancellation of the agreement due to Respondent's non-compliance thereto should both be said to have been just and of reasons.

Therefore, Respondent is liable, it is so found and held, for compensating damage caused to Petitioner as a result of the agreement having been cancelled due to Respondent's non-performance of its obligations thereunder. Exhibits A-O-2 and A-18 through A-22 provides ground to make above finding of facts.

6. Now then what sum or sums Petitioner should be entitled to claim payment from Respondent as damage and as to what item or items will be reviewed in the following:

(1) Petitioner had received from Petri delivery of instruments necessary for the manufacture of cameras, such as, molds, dies, tools and jigs, etc., which were, however, all of extremely inferior quality and unusable without repair and Petitioner made necessary repair to these instruments at the cost equivalent to $6,413.28 which is one item Petitioner demands Respondent to pay. By Exhibit A-O-1, which is the Original Agreement and Exhibits

A-2, A-6, A-7-1 and 2, A-20-1 and 2, we think it appropriate for us to recognize that these instruments were defective and the expenses Petitioner disbursed in making necessary repair thereto came up to the amount as alleged by Petitioner and that Respondent should be held responsible under the Original Agreement for the payment of the expenses.

Respondent states that the ground and the amount of the expenses as alleged by Petitioner are totally denied, but since Respondent submitted no counter evidence at all, Respondent's argument in this regard cannot be maintained.

(2) In addition to the molds, tools, jigs, etc. that Petitioner states that it received from Petri in accordance with the agreement and made necessary repairs thereto in order to use them for the manufacture of cameras, Petitioner had to make another machines and other instruments anew to use the same for the production of 75,000 sets of cameras under Respondent's order and those newly made machines and instruments cost Petitioner yen equivalent to $32,881.27 and that Respondent should pay the same sum to Petitioner.

In support of the said statement, Petitioner submitted Exhibits A-33-1 through 8, A-6, A-7-1 and 2 and the testimony of Witness Shozo Takahashi. Respondent though stating the said Petitioner's allegation is totally denied submitted no evidence at all to support its argument and accordingly we hold that the sum which Petitioner stated in its above contention should be borne and payable to Petitioner by Respondent in its entirety.

(3) Petitioner further states that it paid ¥18,487,702 to Petri for the parts of cameras that Petri had for the purpose of using to manufacture cameras, which Petitioner received delivery from Petri until the end of May, 1966 and that those parts being ¥16,231,137 at Petitioner's own cost price, Respondent is responsible under the agreement to bear and pay the difference of ¥2,256,565 or $6,268.24 to Petitioner.

In support of its said statement, Petitioner submitted Exhibits A-36, A-37-1 and 2, A-38-1 and 2 and the testimony of Witness Shozo Takahashi. As to this part of Petitioner's statement Respondent though denying it in toto, submitted no counter-proof at all. It is held that the sum alleged by Petitioner in the above statement should also be borne and payable by Respondent to Petitioner.

(4) Petitioner contends in the next place that, with its intention to fulfil its obligation under the Original Agreement to supply Respondent with 75,000 sets of cameras before the end of February, 1967, Petitioner manufactured or procured by purchase before the Original Agreement was cancelled on December 29, 1966, completed cameras, half-manufactured cameras and materials which amounted in total to $492,538.00. The cameras were the ones of the special type to the order of Respondent and the films to be used for the cameras were also special film, due to which the cameras were unable to use for other purposes or to resell and accordingly the said $492,538.00 the breakdowns

thereof being as follows is the damage caused to Petitioner by Respondent's non-performance: Price of 12,283 sets of the completed cameras was $162,672.58 (at $13.26 per set which is the sale price to Respondent including Petitioner's 15% sales profit), processed parts $311,637.30 at Petitioner's cost price and materials $18,028.72 at the said cost price.

Exhibits A-33-1 through 8 and the testimonies of Witnesses Shozo Takahashi and Ryoji Fujino were referred to by Petitioner as proofs supporting its said contention. Regarding this point again, Respondent denies the alleged ground and the alleged amount of damage but no counter-evidence was submitted by Respondent. We arbitrators should and accordingly do approve the sum alleged by Petitioner as the sum of the damage Respondent must compensate for Petitioner.

(5) Petitioner states that Petitioner concluded an agreement to deliver by the end of February, 1967 the confirmed order of 75,000 sets of cameras from Respondent under the Original Agreement; that, as a result of the Original Agreement having been cancelled at the end of December, 1966 in the way of its performance and in the way of preparation for its performance, due to Respondent's non-performance of its obligations thereunder, 43,415 sets, the balance of 75,000 sets less 19,300 sets already delivered and less 12,283 sets completed by the time of the cancellation of the Original Agreement, being under Petitioner's custoday, had become undeliverable

to Respondent; that, accordingly, Petitioner could not make profit of $1.989 per set which is 15% of the unit price $13.26, totaling $86,356.41 for 43,417 sets: that Petitioner demands Respondent to pay the said sum of $86,356.41 as the damages sustained by Petitioner fully due to Respondent's defalut abovementioned.

In support of the said statement, Petitioner submitted the testimony of Witness Ryoji Fujino. Respondent though denying this part of Petitioner's statement submitted no proof at all.

It is generally allowed that a merchant includes a reasonable profit in his sales price and accordingly we hold that the 15% profit in the sales of Foto camera asserted by Petitioner is not unreasonable. In addition to that, Respondent submitted no argument, nor proof as to whether the said profit is reasonable or not. Therefore, it should be appropriate that we Arbitrators do approve the said sum as the damage caused to Petitioner by Respondent's default.

(6) Petitioner asserts that Petitioner continued to hold the completed cameras, processed parts and materials referred to in (4) of 6 since the date Respondent stated in its letter of September 6, 1966 that it would not proceed further until it received all the Cameras covered by its current Letter of Credit (see Exhibit B-1): that Petitioner stored them in the warehouse of Sekonic Co., Ltd., a third party to the present arbitration, which Petitioner rented at the storage charge of ¥2,500 per tsubo per month and that the said storage charge paid by Petitioner to the said warehouse owner

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for 4 months from October, 1966 until the end of January, 1967 amounted to ¥1,450,600 ($4,043.33).

Exhibits A-39-1 and 2 and the testimony of Witness Yoshio Mato were referred to by Petitioner as proof supporting its said contention. Even with these prooves, however, it is not held that the said fact and the said detailed amount have sufficiently been proved. We Arbitrators, accordingly, do not approve the sum alleged by Petitioner as the damages.

(7) Petitioner next states that its President Masato Kasai and one other of Petitioner company, Utada, visited New York to discuss the matter for making Respondent perform its obligation and the travel and staying expenses of total $3,000 is also another item of the damage caused to Petitioner by Respondent. However, the said travel is not what Petitioner was ever entitled to do nor are they what is necessary and indispensable for Petitioner to do. There is no reason why Respondent should be held liable for compensating the said expenses to Petitioner. Petitioner's claim as to this item is disallowed.

Therefore, Petitioner's claim is found to be of grounds and reason to the extent of the total of the sums enumerated in (1) through (5) above, namely, $624,457.80 and an additional damage caused by the delayed payment of the said total amount at the rate of 6% per annum as computed as from January 1, 1967 until the time when the said total amount will have been ful' paid. Respondent shall be held responsible for paying the same to Petitioner.

7. We may add to the above a few remarks as follows:

Respondent submitted before us a telegram and a letter respectively to the effect that Respondent has filed with the U.S. District Court, Eastern District of New York, U. S. A. an application for the reorganization of the corporation and received recommendation from the referee in bankruptcy that the present arbitration proceedings should be stayed and also that court's order to the same effect has been issued. However, Respondent has made no particular statement or contention as to how the present arbitration proceedings should legally be disposed of.

It is the opinion of the Arbitrators that the presnet arbitration proceedings should be held pursuant to the Commercial Arbitration Rules of the Japan Commercial Arbitration Association, as to which point both parties hereto have stated that they both share the same views with us, and that the present proceedings are held in Japan and that, accordingly, the court proceedings involving Respondent before the U.S. District Court, Eastern Disctrict of New York, U.S.A. should not affect the present arbitration in any manner whatsoever. We Arbitrators are also of the opinion that there is no need for us to mention anything on the problem that what force and effect should our award to the present arbitration case have upon the said court case involving Respondent and that we should not do so.

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Upon deliberation on the reasons above-stated, the majority of the Arbitrators allow Petitioner's claim to the extent as indicated in the Text of the Award and the arbitration expenses shall be by application of the Commercial Arbitration Rules allocated and borne by both parties also as shown in the Text of the Award, and Arbitrator George A. Furness expresses the following opinion:

He regrets that he feels that he must file a separate opinion since he does not agree with the majority of the Arbitrators that Petitioner's claim should be allowed in the amount of $624,457.80 (equivalent to ¥224,804,808) nor that the award should be for that amount. He is of the opinion that the claim of Petitioner for loss of profit in the amount of $86,356.41 should not be allowed so that Petitioner's claim should be allowed only in the amount of $537,928.33 (equivalent to ¥193,654.198) together with interest thereon at the rate of 6% per annum from January 1, 1967 until paid in full. He agrees that for the 12,263 completed cameras Petitioner should be entitled to $162,872.58 that is $13.26 per set because that was the price which Respondent agreed to pay, but that would be true whether Petitioner would have made a profit of 15%, a greater or less profit, or no profit or even a loss on its sale to Respondent. But, to entitle Petitioner to a 15% profit on the cameras which Petitioner did not produce, he is of the opinion that Petitioner would be required to show by evidence that there was a 15% difference between its cost of producing a set and the unit sales price

of $13.26 as a basis of its claim that it lost a profit of $86,356.41 on the 43,417 sets which it did not complete. He found no evidence of such difference in the testimony of the witness Fujino, the testimony of any other witness, nor in Exhibits A-39-1 and 2 nor in any other Exhibit. In fact he found no evidence of Petitioner's cost in producing a set and, in his opinion, such evidence was required to prove such loss of profit.

Finally, while he agrees that the arbitration expenses are $6,000.00 (equivalent to ¥2,397,840), he does not agree that Respondent should bear 90% thereof and Petitioner only 10% thereof. He is of the opinion that Respondent should bear 70% of such expenses and Petitioner 30% thereof, on the condition that should Petitioner pay on Respondent's behalf any of the portion which should be borne by Respondent, Petitioner shall be entitled to demand that Respondent repay such portion to Petitioner.

September 18, 1970

The Commercial Arbitration Tribunal
of The Japan Commercial Arbitration Association

Arbitrator _____
Shunzo Kobayashi

Arbitrator _____
Yoshikatsu Sakamoto

Arbitrator _____
George A. Furness

THE JAPAN COMMERCIAL ARBITRATION ASSOCIATION TOKYO JAPAN

Debtors Objections to Allowance of Claim

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

No. 70 B 209

[SAME TITLE]

SIR:

PLEASE TAKE NOTICE that the debtor objects to the allowance of claim (No. 204) filed by COPAL CO., LIMITED in the sum of $624,457.80 on the ground that the debtor is not indebted to the claimant in any amount and on the contrary the claimant is indebted to the debtor in an amount upwards of $1,000,000.00 (the exact amount to be established by the debtor) by reason of the breach of contract which had been entered into with the claimant on April 25, 1966, in that the claimant delivered defective cameras, contrary to the provisions of the said agreement, representations and warranties.

COUNTERCLAIM

Debtor sustained damages in an amount of upwards of $1,000,000.00 for monies extended and loss of profits by reason of cancellation of sales, all resulting from the acts and conduct of the claimant, breaching a certain contract dated April 25, 1966 and delivering defective cameras.

WHEREFORE, debtor respectfully prays that the claim of COPAL CO., LIMITED be disallowed and damages awarded to

the debtor for the loss sustained by reason of the breach of contract.

PLEASE TAKE FURTHER NOTICE, that a hearing of the objection to the claim herein and the debtor's counterclaim will be heard before Hon. Sherman D. Warner, Referee in Bankruptcy, on the 20th day of July, 1971 at 10:30 A.M.

Dated: July 8, 1971

/s/ LOUIS P. ROSENBERG
Louis P. Rosenberg
Attorney for Debtor
16 Court Street
Brooklyn, New York 11241
Tel: 855-6840

To:

WHITMAN & RANSOM, ESQS.
522 Fifth Avenue
New York, New York

TRANSCRIPT OF HEARING

UNITED STATES DISTRICT COUNT
EASTERN DISTRICT OF NEW YORK
IN BANKRUPTCY

----------X

IN THE MATTER :

OF :

No. 70-B-209

PHOTOCHROME, INC., :

Debtor. :

----------X

Jamaica, Long Island, New York
March 8, 1973,
At 2.30 o'clock p.m.

BEFORE:

HON. C. ALBERT PARENTI,

Referee in Bankruptcy.

- - - -

HEARING ON MOTION OBJECTING
TO CLAIM NUMBER 204 FILED BY
THE COPAL CO., LTD.

PROCEEDED PURSUANT TO NOTICE

- - - -

APPEARANCES:

LOUIS P. ROSENBERG, ESQ.,
Attorney for the Debtor,
16 Court Street
Brooklyn, New York.

APPEARANCES: (Cont'd.)

WHITMAN & RANSOM, ESQS.,
Attorneys for the Copal Co., Ltd.,
Claimant,
522 Fifth Avenue
New York, New York
By: DUGALD CAMPBELL BROWN, ESQ., of Counsel.

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(Then followed an extended discussion.)

THE REFEREE: This is an evidentiary hearing called for the purpose of supplementing the records on the issues before me with reference to further evidence as to what transpired subsequent to the delivery of a stay order upon the Commercial Arbitration Tribunal of Japan.

Appearing in that regard are Louis P. Rosenberg for the Debtor in Possession, and in opposition Whitman & Ransom, by Dugald Campbell Brown.

Gentlemen, you may proceed with any papers or with any testimony which you feel will be pertinent to this issue.

MR. BROWN: If the Court please, there was taken pursuant to notice a deposition of

Mr. Hattori, the tribunal clerk of the Japan Commercial Arbitration Association, the original tape of which was sent to you by Mr. Tsukyama, which was sent to you by the American Vice Consul of Tokyo before whom the deposition was taken.

I have supplied Your Honor with a transcript taken from our copy of that tape. I would like to mark it for identification at this time.

THE REFEREE: Will you describe it to the Court Reporter, please?

MR. BROWN: Yes, Your Honor. Would you please mark for identification a document consisting of seven pages, bearing the caption in this action and the title of "Examination Before Trial of Hiroshi Hattori," as Claimant's Exhibit 1 for identification.

(Deposition of Hiroshi Hattori, consisting of seven pages, referred to above, marked Claimant's Exhibit 1 for Identification. 3-8-73, J.J.Y.)

MR. BROWN: I move that Claimant's Exhibit 1 for Identification now be introduced

into evidence, if Your Honor please.

THE REFEREE: Do you have any objection to that, Mr. Rosenberg?

MR. ROSENBERG: No, Your Honor. I have no objection to that; no, sir.

THE REFEREE: Then, mark it in evidence.

(Claimant's Exhibit 1, previously marked for Identification, was thereupon received in evidence.)

MR. BROWN: Would you please mark as Claimant's Exhibits 2-A, 2-B, 2-C and 2-D in evidence a translation or a summary translation of the minutes of the Japan Commercial Arbitration Association. Mr. Rosenberg has stipulated that the matter for those translations are accurate translations of the minutes or summary of the minutes.

Would you also mark as Claimant's Exhibit 2-E a document which has previously been marked as Mr. Hattori's deposition as Plaintiff's Exhibit number 3 for Identification, being a certified copy of the minutes prepared by the Japan Commercial Arbitration Association of the hearing which took place

before that tribunal in the arbitration between the Debtor and the Plaintiff.

THE REFEREE: And let the record indicate that they are in the Japanese language.

MR. BROWN: That is correct, Your Honor.

MR. ROSENBERG: No objection, if Your Honor please.

THE REFEREE: Then, they will be received and marked in evidence.

(Summary translation of the minutes of the Japan Commercial Arbitration Association, together with certified copy of minutes prepared by the Japan Commercial Arbitration Association of the hearing between the Debtor and the Plaintiff, referred to above, received in evidence and marked Claimant's Exhibits 2-A, 2-B, 2-C, 2-D and 2-E, 3-8-73, J.J.Y.)

MR. BROWN: I would like to call Mr. Yoshikawa to the stand, please.

MR. ROSENBERG: What is the purpose of calling him as a witness? Maybe I will stipulate to that.

MR. BROWN: I want him to testify with respect to Japanese law.

MR. ROSENBERG: You want him to testify with respect to Japanese law?

MR. BROWN: Yes, that is correct.

MR. ROSENBERG: Well, let me put my documentary proof in first, and then you may go ahead.

MR. BROWN: I am going to object to it, so please mark it for identification.

MR. ROSENBERG: Yes. If Your Honor please, there was filed with the Court the answers to interrogatories which were served upon Mr. Michael A. Braun, Esq., of the firm of Braun, Morriya & Hoashi, attorneys representing Fotochrome in the arbitration proceedings.

With respect to the statement that counsel is going to object to the introduction of the responses to the interrogatories, I would like to submit to the Court a copy of a letter which I addressed to the firm of Whitman & Ransom on June 9, 1972, the reply thereto by that firm dated June 20th, 1972, my reply to that letter dated July 5, 1972, the Debtor's notice to take interrogatories of Michael A.

Braun dated July 3, 1972, a copy of which was served upon the firm of Whitman & Ransom, and the fact, Your Honor, that at no time did anyone from that office question the right of the Debtor to proceed by way of interrogatories.

As a matter of fact, If Your Honor please, in the letter by Whitman & Ransom dated June 20th, 1972 it was even suggested that I do so by way of interrogatories.----

MR. BROWN: (Interposing) I am sorry, but I believe that that misstates the letter, Mr. Rosenberg.

MR. ROSENBERG: It says, "I fail to see why you would not prefer to take Mr. Braun's deposition in Japan."

I submit, Your Honor, that if the rules do not provide for that, that counsel has waived objections to the introduction of these interrogatories. May I exhibit to Your Honor all of these letters which I am going to introduce into evidence (handing papers to the Referee)?

THE REFEREE: The only condition that is set forth here is the accuracy of the content

of Mr. Braun's deposition.

MR. BROWN: Do youmean in the answers to the so called interrogatories, Your Honor?

THE REFEREE: Yes. Mr. William Kann from your office indicates that in the last paragraph of a letter dated June 20th, 1972, that the only objection would be as to the accuracy of the content of the interrogatories.

There seems to be an agreement spelled out that this be the procedure to be followed.

MR. BROWN: Well now, if Your Honor pleases, that statement is to the effect that if the statements are accurate, we will not object to that. We have reviewed the answers to the interrogatories, and to some extent they differ from the minutes, and accordingly, we are objecting to that.

THE REFEREE: Then, your basis of objection has changed.

MR. BROWN: No, sir. Our basis of objection has not changed. Our basis of objection is that the receipt in evidence in this proceeding of those answers as evidence

or facts stated therein is hearsay, and not within any of the sanctions, and my time to object to it according to Rule 33 is at the time they are put into evidence, and not before that.

If he is serving interrogatories on somebody, how can I object to it? They are not being served on me. Rule 33 says that I answer or object to interrogatories served upon me.

Rule 33 says you can do it, but they are subject to the rules of evidence. This statement by Mr. Braun is heresay, if Your Honor please.

THE REFEREE: I donot frankly see the great significance of whether these interrogatories go into evidence or not.

MR. ROSENBERG: I just want to know in what respect Mr.Braun's responses are not accurate or inconsistent with what you are saying.

THE REFEREE: He is not saying that. He is saying that the interrogatories are in the nature of hearsay, and as to that I think

he is correct. You cannot cross examine interrogatories.

MR. ROSENBERG: But I did give him an opportunity to examine, if Your Honor pleases, or to so cross interrogatories.

THE REFEREE: Obviously you did. The letters indicate that there was no objection to it at the time.

MR. ROSENBERG: It was even suggested that I do that. Mr. Kahn spoke to me on the telephone, and he asked me to do that.

MR. BROWN: Mr. Kahn stated in his letter that you take Mr. Braun's deposition.

MR. ROSENBERG: Yes, and I did.

MR. BROWN: No. YOu sat out to take interrogatories.

MR. ROSENBERG: But they are the same.

MR. BROWN: No, they are not.

MR. ROSENBERG: They were the same questions.

THE REFEREE: All right. Submit your interrogatories, and formulate your objections. I will reserve decision as to whether they will be admitted into evidence.

MR. ROSENBERG: Yes, Your Honor. At this time I offer in evidence my letter dated July 5, 1972 addressed to Whitman & Ransom, and the reply thereto from Whitman & Ransom dated June 20th, 1972 ---- I beg your pardon. The first letter is dated June 9, 1972, and the reply thereto is dated June 20th, 1972, my reply to that letter dated July 5, 1972, a copy of the Debtor's interrogatories to the witness, Michael A. Braun, dated July 3, 1972, and Mr. Braun's response or answer to the interrogatories sworn to October 10, 1972.

Let the record also show that a copy of the Debtor's interrogatories was served upon Whitman & Ransom, and a copy of the answers thereto was also forwarded to Whitman & Ransom.

I offer these into evidence as one exhibit, if Your Honor please.

MR. BROWN: Does Your Honor want me to state my objection to that offer in evidence?

THE REFEREE: Yes, I do.

MR. BROWN: I object to the receipt of the letters upon the ground that they have

no probative value concerning the issues to be tried in this proceeding.

I also object to the entry of the answers to the interrogatories into evidence on the ground of hearsay, which is more fully developed in the memorandum which has been submitted to Your Honor.

MR. ROSENBERG: The reason for my introducing those letters in evidence, Your Honor, is that I think fair practice suggests that counsel treat each other fairly; and when it is suggested to me that a certain letter which is not sworn to would not be consented to be considered in evidence, and alternatively it is suggested to mean to take interrogatories, to take the man's interrogatories ----

MR. BROWN: (Interposing) No, it is not, Mr. Rosenberg. It says, "Take a deposition." This is the third time you have misstated that.

MR. ROSENBERG: I do not see the distinction between a deposition and interrogatories. The difference between a deposition

and interrogatories is that on a deposition you would not be entitled to be heard, and on interrogatories ----

THE REGISTRAR: (Interposing) Let us not go into this, gentlemen. I do not think it is important whether it is an interrogatory or whether it is a deposition.

Now, will you give us the distinction, Counsellor?

MR. BROWN: Yes, Your Honor. Under Federal Rule 30 when a deposition is taken all parties to the proceeding may attend and cross examine the witness there being deposed. With respect to interrogatories there is no procedure in Rule 34 for the service of cross interrogatories or to cross examine in any way the witness who is answering the interrogatories.

In fact, the interrogatories are limited to the parties, and the reason why the interrogatories are limited to the parties is that the answers to the interrogatories may be used on the trial of the action, because they are within the hearsay exception, being ad-

clarations against interest by the parties which you put them in against.

However, to go out and take a statement from a witness, albeit under oath, and then introduce it at the trial, is purely hearsay, if the Court please.

THE REFEREE: The purpose of this hearing is to establish some basic form of finding. It is not an issue of trial per se. This is merely an informative document as I see it.

I am at a loss to determine here just how far these proceedings can progress without it. It is not in the nature of any evidence which will decide the issue on the merits.

It is merely informative in nature, and frankly, the need for this strong objection to it on this preliminary evidenciary hearing to eliminate this is unnecessary.

Therefore, on that basis I will overrule your objection, and I will accept it.

MR. BROWN: Note my exception, please.

THE REFEREE: It has a limited purpose.

It will not in any way affect the material issues which are involved here, but it will enlighten the Court as to just how far these proceedings went in Japan, although I do not think that is a vital factor that is here involved.

MR. BROWN: I do not, either, Your Honor,

THE REFEREE: It is not the vital factor that is here involved, and that is why I am going to permit it to go into evidence as an informative document really, rather than as material evidence.

MR. BROWN: Well, now I am at a loss to understand Your Honor's ruling. If I understand you correctly the answers to the interrogatories introduced into evidence are being received in evidence.

If that is Your Honor's ruling, then note my exception to it.

THE REFEREE: Yes, that is my ruling.

MR. BROWN: Then, note my exception to it.

THE REFEREE: Then, your exception is noted. Mark it in evidence. The original

is on file. It is a filed paper as of October 17, 1972.

(Answers to interrogatories served upon Michael A. Braun, together with copy of letter addressed by Mr. Rosenberg to Whitman & Ransom, dated June 9, 1972, the reply thereto by that firm dated June 20th, 1972, Mr. Rosenberg's reply to that letter dated July 5, 1972, and the Debtor's notice to take interrogatories of Michael A. Braun, dated July 3, 1972, received in evidence and marked Debtor's Exhibit A, 3-8-73, J.J.Y.)

MR. ROSENBERG: Do you now want to call your witness?

MR. BROWN: Yes, I do.

THE REFEREE: Then, you may call your witness, Mr. Brown.

MR. BROWN: I call Mr. Yoshikawa, please.

S E I I C H I Y O S H I K A W A, residing at the 19 Mori Building, Minato, Tokyo, Japan, called as a witness in behalf of the Claimant, being first duly sworn by the Referee, testified as follows:

DIRECT EXAMINATION

BY MR. BROWN:

Q. Have you given your name and address to the Court Reporter, Mr. Yoshikawa?

A. Yes, I have.

Q. Will you state briefly your educational background and experience?

A. Okay. I graduated from the law school of the University of Tokyo in 1963, and received a degree of Bachelor of Law. In Japan in order for you to qualify as a lawyer, you must have a two year period of training at a special institute called Legal Training and Research Institute. So, I went to that Institute from April, 1963 until March of 1965.

I completed the course there, therefore, as of the end of March, 1965, and then I was admitted to the Japanese Bar upon my completion of that training. In 1968 under the scholarship of the Ford Foundation I came ----

THE REFEREE: (Interposing) You are admitted to practice, and that is sufficient.

THE WITNESS: All right, then, Your

Honor.

THE REFEREE: I find you to be eminently qualified.

THE WITNESS: Thank you, Your Honor.

Q Mr. Yoshikawa, assume for the moment that there is an arbitration proceeding pending in Japan before the Japanese Commercial Arbitration Association, and assume further that in a proceeding in the Eastern District of the Federal District Court for the Eastern District of New York there is filed a Chapter XI proceeding in which the Court issues an order to the creditors of that Debtor staying all actions, suits and proceedings against the Debtor, and having made those assumptions have you formulated an opinion as to the effect that such an order would be given in Japan under Japanese law?

MR. ROSENBERG: I object to that, if Your Honor pleases. That is a conclusion of a matter which Your Honor is going to decide, and not any witness.

THE REFEREE: Objection sustained.

MR. ROSENBERG: It is not an interpre-

tation of the Japanese law. It is an interpretation of the United States Bankruptcy Act.

MR. BROWN: I do not believe so. The question which I put to Mr. Yoshikawa was, has he formed an opinion as to Japanese law, what effect the Japanese law would give to that order.

MR. ROSENBERG: I object to that question, if Your Honor pleases.

THE REFEREE: You have not laid a proper foundation or groundwork for the question, Counsellor; and the objection to the question is sustained.

MR. BROWN: In what way, Your Honor?

THE REFEREE: You are asking him to give an opinion as to what a Japanese Court would do. I do not think he is qualified to do that, to testify as to what a Japanese Court would do.

That is what I find objectionable here.

MR. BROWN: If Your Honor will hear his answer, I do not think there would be

any problem.

MR. ROSENBERG: The problem as I view it, and I have made my objection accordingly, is not what the Japanese Court will do but it is what the United States Court would do in the face of an order of this Court restraining that arbitration.

MR. BROWN: But I am not asking Mr. Yoshikawa to testify concerning anything about American law ----

THE REFEREE: (Interposing) Then, ask him what section or what code under Japanese law would be applicable, and not what a Court would do, Counsellor.

MR. BROWN: Very well, then, Your Honor.

THE REFEREE: Because that would be a proper foundation.

THE WITNESS: Okay. The pertinent law to this question or the pertinent statute to this question is Code of Civil Procedure, which is law number 29 of 1890 as amended.

Article 514, Paragraph 1, provides to

the effect that a judgment rendered by a foreign Court can be enforced in Japan only when the Japanese Court renders an enforcement judgment thereon ---- excuse me; I will state it again ---- enforced only when a Japanese Court renders a judgment that such judgment by the foreign Court is lawful under the Japanese law.

BY MR. BROWN:

Q Mr. Yoshikawa, having in mind the assumptions which I asked you to make previously, concerning certain facts, do you have an opinion as to the Japanese law concerning the duty or obligation of the arbitrators once a matter is submitted to them to render an award?

MR. ROSENBERG: I object to that question, if Your Honor pleases.

THE REFEREE: Objection sustained.

Q Mr. Yoshikawa, are there provisions of the Japanese Civil Code concerning the duties of arbitrators to render their award when arbitration proceedings are commenced before it?

MR. ROSENBERG: I object to that, if

Your Honor please.

THE REFEREE: Objection overruled.

A. Yes, there are.

Q. Will you please tell us what they say?

MR. ROSENBERG: And please tell us what section you are reading from, Mr. Yoshikawa.

A. Okay. Maybe I should have that question clarified again. Could you put the question to me again, please?

Q. Yes. The question which I am attempting to elicit information on, Mr. Yoshikawa, is, are there provisions of the Japanese Code of Civil Procedure concerning the arbitration procedure ---

THE REFEREE: (Interposing) Give us that first, and we will go slow, and give us the section that applies to the arbitration proceedings first, please.

THE WITNESS: Okay. Title 8 of the same law, in other words, of the Code of Civil Procedure has provisions concerning the arbitration proceedings.

Q. And does Article 8 contain provisions concerning the sanctions which could be imposed

upon arbitrators for failure to decide matters which are submitted to them for arbitration, Mr. Yoshikawa?

MR. ROSENBERG: I object to that, if Your Honor pleases.

THE REFEREE: Objection overruled. You may answer the question, and tell us what section you are reading from now, not an interpretation, but give us the section you are reading from, Mr. Yoshikawa.

THE WITNESS: Okay, Your Honor. I think the pertinent provision concerning that is first, Article 793 which provides among other things that the agreement to bind an arbitrator can be terminated if the arbitrator appointed delays unduly the performance of his responsibilities as an arbitrator.

THE REFEREE: That has no significance to the issue here.

MR. BROWN: I think it does, Your Honor.

THE WITNESS: Well, the other provision which is related to that is Article 801 ---- well, I don't know. Maybe without an explana-

tion of the relationship between the article that I have just read and the article that I am going to now read, it is rather difficult to understand.

BY THE REFEREE:

Q Well, let me ask you this question, Mr. Yoshikawa. Does an arbitration award from a tribunal in Japan have the same effect as a judgment?

A Yes, it does.

Q Without filing it as a judgment?

A Pardon me?

Q Without filing it as a judgment?

A Yes, it does.

Q In other words, then, a successful party in an arbitration proceeding in Japan can go into the Court and have it enforced without having it turned into a judgment?

A That is correct.

Q Well, that is not the law here in the United States, incidentally. Will you give us the section that sets that forth?

A Yes, I will. It is Article 800.

Q And would you read the contents of it?

A. Okay. The arbitrator's award has the same effect as the Court's judgment ---- I mean, excuse me, as the Court's judgment which has become final and conclusive.

Q. Which has become final and conclusive?

A. Yes, which has become final and conclusive.

Q. How does the award become final and conclusive?

A. I am saying that an arbitrator's award has the same effect as a final and conclusive judgment on the Court.

THE REFEREE: All right, you may proceed, Counsellor.

MR. BROWN: I have nothing further of Mr. Yoshikawa, Your Honor. Yourwitness, Mr. Rosenberg.

CROSS-EXAMINATION

BY MR. ROSENBERG:

Q. Mr. Yoshikawa, are you familiar with the Bankruptcy Act of the United States?

A. No, I am not.

Q. Is there any provision for injunctions in Japan?

A. (No response.)

Q Do you know what an injunction is?

A. Yes, I do.

Q Does the Court render an injunction or issue an order of injunction there in Japan?

A. Under what circumstances?

Q Under any circumstances, is there any provision for the issuance of an injunction in Japan?

A. Not in the sense, as I understand it, as the injunction which exists in the United States.

Q Is there any provision in the Japanese law where a party to the arbitration proceeding procures an order restraining the arbitration proceeding because of certain facts?

A. Yes. There is a procedure available under certain circumstances.

Q Do you know whether or not arbitrators are bound by orders, let us say, of another country?

MR. BROWN: Oh, I object to that, if Your Honor please. That calls for a conclusion.

S. Yoshikawa - cross

THE REFEREE: I will permit it if he knows. The objection is overruled. You may answer the question, Mr. Yoshikawa, if you know.

THE WITNESS: What is the question, again?

Q Do you know if arbitrators will respect an order from another country restraining them from proceeding?

MR. BROWN: In Japan, do you mean?

Q Yes, in Japan?

MR. BROWN: I object to that, if Your Honor please. This witness is an expert on Japanese law.

THE REFEREE: I am going to ask that you rephrase the question, Mr. Rosenberg. I know what he is driving at, and I think it would be helpful to get an answer to it.

However, rephrase your question, Mr. Rosenberg, if you will.

MR. ROSENBERG: Yes, Your Honor.

Q Mr. Yoshikawa, if the United States issued an order of if a Court in the United States

issued an order restraining a continuance of the arbitration, would the arbitrators in Japan recognize that order?

A. (No response.)

THE REFEREE: Is there anything under Japanese law which would compel them to recognize such an order?

THE WITNESS: My answer is that under the same provision that I wrote before concerning the enforcement of a foreign judgment, arbitrators will not be bound by such Court order of a foreign country until and unless the Japanese Court renders its own enforcement order with respect to the judgment issued by the foreign Court.

THE REFEREE: In other words, then, there is a judgment rendered, let us say, in the United States, and before the Japanese Court would respect that judgment there is something else that has to be done, is that correct?

THE WITNESS: My answer to that is, yes.

THE REFEREE: What would have to be done

in addition? Would the judgment have to be filed in the Japanese Court?

THE WITNESS: Yes. The judgment would have to be filed in the Japanese Court, and the Court will so confirm that judgment in its own proceeding.

THE REFEREE: Well, isn't that what is done here in effect?

MR. BROWN: Are you addressing that question to me, Your Honor?

THE REFEREE: Yes, I am.

MR. BROWN: Yes. in a way.

THE REFEREE: And it was never perfected as a judgment, was it?

MR. BROWN: Perfected where, Your Honor?

THE REFEREE: It was never perfected as a judgment in the United States District Court, was it?

MR. BROWN: We were restrained from doing it, if Your Honor please.

THE REFEREE: Well, now you are recognizing the stay in one aspect, and not in the other aspect.

S. Yoshikawa -

MR. BROWN: I recognize the stay where I asked the United States Court where this Court has jurisdiction to restrain me from issuing a judgment in this proceeding, and that is what we did when we filed our proof of claim in this case, if the Court please.

THE REFEREE: Will you clarify for me what prevented you from filing the award as a judgment in this country?

MR. BROWN: Because there is no procedure for doing that, Your Honor. Under Article 75 of the Civil Practice Law we must make a motion to confirm the award, which would ultimately lead to a judgment on confirmation.

However, under Your Honor's order we were stayed ----

THE REFEREE: (Interposing) It was not my order, no.

MR. BROWN: Excuse me, Your Honor?

THE REFEREE: I never made any such order which precluded you from filing your award and seeking to confirm it as a judgment,

Counsellor.

MR. BROWN: That would have been the commencement of a special proceeding under Section 75 of the Civil Practice Law, and I assumed that Your Honor's order stayed all proceedings against the Debtor here.

MR. ROSENBERG: I am through with this witness, if Your Honor please.

MR. BROWN: If Your Honor is telling me that I am not stayed from doing that, then I will go in your office and----

THE REFEREE: (Interposing) I do not think you were ever stayed from doing that. If the arbitration proceeding came to a conclusion, then what stayed you from entering it as a judgment here?

If you disregarded that stay order to proceed to arbitration, why should you be stayed from entering your judgment here?

MR. BROWN: Because I believe I was stayed from doing that in the State of New York, if Your Honor pleases.

MR. ROSENBERG: May I ask the witness

this question; Mr. Yoshikawa, are you familiar with any treaties between the United States and Japan whereby both countries recognize judicial decrees of an award or a judgment made in Japan to be accepted here in the United States, and vice versa?

THE WITNESS: No, sir; I do not know that.

MR. ROSENBERG: You do not know that?

THE WITNESS: No, I do not know that.

MR. ROSENBERG: All right. That is all of Mr. Yoshikawa, if Your Honor pleases.

THE REFEREE: Are you aware of any treaty under the auspices of the United Nations which will grant an international arbitration award the same status as a judgment?

THE WITNESS: No, I am not.

THE REFEREE: All right. Now I think I have sufficient material to make a decision in this matter if I could find the other papers with respect to it.

MR. ROSENBERG: Your Honor, I took the

liberty of ----

THE REFEREE: (Interposing) This was not submitted today, you know.

MR. BROWN: It is a filed paper, sir.

MR. ROSENBERG: Your Honor, on page 23 of the award which is now considered in evidence, the arbitrator states that the witnesses were never produced. Then, Your Honor, on page number 40 of the award they admit that they knew about the stay, and so on, and so forth.

THE REFEREE: Maybe I have not made myself clear. All of this is an aid to the Court.

MR. ROSENBERG: That is correct, Your Honor.

THE REFEREE: I continued this proceeding which had been commenced by my predecessor. Otherwise, this would not have been necessary. This was merely to give the background.

All I am concerned with here is attempting to add to the record so that I can come to a judgment on the original papers.

MR. ROSENBERG: Very well, then, Your Honor.

MR. BROWN: If Your Honor pleases, I would like to say one thing concerning Mr. Yoshikawa's testimony, and that is this: I think it is clear from the testimony that there was a procedure available in Japan by which the stay could have been enforced by seeking an enforcement judgment from a Japanese Court.

Secondly, another aspect of his testimony is that in the absence of that the arbitrators were under a legal duty to make an award.

THE REFEREE: I find no fault with what the arbitrators did to the stay pursuant to law which is directed by the parties. This Court cannot stay another Court or an arbitration tribunal, but it has the power to stay the parties.

It is the parties who proceeded to arbitration after they were served with a stay order that corresponds to the issue here.

MR. BROWN: The question is whether this Court had at that time any jurisdiction over my client, Your Honor. It was not doing any business here, and there is no claim that it was doing any business here.

THE REFEREE: Well then, how did it develop a one million dollar claim with an American concern without doing any business here?

MR. BROWN: By manufacturing cameras in Japan, and selling them in Japan against a letter of credit. It was not done in the United States, if Your Honor pleases.

MR. ROSENBERG: The point that I make, Your Honor, is that a Debtor Estate or a Bankrupt Estate is lodged in the jurisdiction of this Court. Everybody seeking an interest says, "I want to participate in the distribution of that estate."

The thrust of my contention is that here is a Court which has jurisdiction over the res, the assets of the estate of this Debtor, with full knowledge that somebody in Japan

is seeking to make an encroachment on the very assets here with a disputed claim in controversy, and the Court in its wide discretion issues an order which is forwarded to the parties and to the arbitration tribunal to serve notice that the assets of the Debtor are now lodged in the District Court, subject to the rights of the creditors therein.

Instead of coming in here and seeking to modify or to vacate that restraining order, the creditor completely ignores it and completes the arbitration, shall I say, Your Honor, unilaterally, and now comes in and says, "I want to participate in the assets of this estate, and you, Mr. Court, I do not acknowledge the correctness of your order, and I am trying to enforce that arbitration award."

I say to Your Honor that in law, in equity and in morality, that is wrong. I have presented my brief, and ----

THE REFEREE: (Interposing) I am not

concerned with morality, Mr. Rosenberg.

MR. ROSENBERG: I have presented my brief, and there is very little that I can add to it, if Your Honor please.

THE REFEREE: There is nothing that you can add to it, Mr. Rosenberg. I just wanted some background here, and I think I have now sufficient background to now tackle the issue. As I said before, had I been in this matter from its commencement, I do not think this would have been necessary, frankly.

However, I now feel satisfied that I have sufficient to make a decision in this matter.

MR. ROSENBERG: Yes, Your Honor.

THE REFEREE: You may step down, Mr. Yoshikawa.

Subscribed and sworn to before me
this day of , 1973.

THE REFEREE: Decision reserved. This is merely in the nature of an evidenciary

hearing requested by the Court.

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(HEARING ON MOTION OBJECTING TO CLAIM NUMBER 204, FILED BY THE COPAL CO., LTD., CLOSED.)

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W I T N E S S E S

	Direct	Cross
1. Seiichi Yoshikawa	16	25

* * * *

E X H I B I T S

Number	Description	Page
Claimant's Exhibit 1 for Identification.	Deposition of Hiroshi Hattori consisting of seven pages.	3
Claimant's Exhibit 1 in evidence.	Previously marked for Identification.	4
Claimant's Exhibits 2-A, 2-B, 2-C, 2-D and 2-E in evidence.	Summary translation of the minutes of the Japan Commercial Arbitration Association, together with certified copy of the minutes prepared by the Japan Commercial Arbitration Association of the hearing between the Debtor and the Plaintiff.	5
Debtor's Exhibit A in evidence.	Answers to interrogatories served upon Michael A. Braun, together with copy of letter addressed by Mr. Rosenberg to Whitman & Ransom dated June 9, 1972, the reply thereto by that firm dated June 20, 1972, Mr. Rosenberg's reply to that letter dated July 5, 1972 and the Debtor's notice to take interrogatories of Michael A Braun dated July 3, 1972.	16

CLAIMANT'S EXHIBIT 1

EXAMINATION BEFORE TRIAL OF HIROSHI HATTORI

Claimant's Ex 1 [illegible]
3/8/77 JBJ

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

----------x

In the Matter :

of :

FOTOCHROME, INC., :

Debtor. :

----------x

EXAMINATION BEFORE TRIAL of HIROSHI HATTORI, Clerk of the Arbitration Tribunal of The Japan Commercial Arbitration Association, taken by the Claimant, Copal Company Limited, pursuant to Notice, held at the United States Embassy, 10-5, Akasaka 1-Chome, Minato-Ku, Tokyo, Japan, on November 28, 1972, before Robert A. Tsukayama, the Vice Consul of the United States.

Appearances:

WHITMAN & RANSOM, ESQS.
Attorneys for Claimant
COPAL COMPANY LIMITED
522 Fifth Avenue
New York, New York 10036

BY: F. HERBERT PREM, JR.

1 2 3

103a

Mr. Prem: I am F. Herbert Prem, Jr., a member of the firm of Whitman & Ransom, attorneys of record for claimant, Copal Company Limited, in a proceeding pending in the United States District Court for the Eastern District of New York, entitled "In the Matter of Fotochrome, Incorporated, Debtor, Index Number 70-B-209". What follows is the deposition of Hiroshi Hattori, the Clerk of the Arbitration Tribunal of the Japan Commercial Arbitration Association held on this 28th day of November, 1972 at the United States Embassy in Tokyo, Japan, pursuant to a notice to take this deposition upon oral question to counsel for debtor, Fotochrome, Incorporated. Would you please mark this for identification as Claimant's Exhibit One, this date? This deposition is being recorded on electromagnetic tape by means of an electronic recording device, under the supervision and direction of a Vice Consul of the United States, assigned to the United States Embassy at Tokyo, Japan, pursuant to a stipulation by the parties which has been approved and so ordered by the Referee in Bankruptcy for the Eastern District of New York. Would you please mark this stipulation for identification as Claimant's Exhibit Two, this date? With me is the Vice Consul

of the United States and the witness. Counsel for the debtor has not made an appearance. The next voice to be heard will be that of Robert A. Tsukayama, the Vice Consul of the United States.

Mr. Tsukayama: I am Robert A. Tsukayama, Vice Consul of the United States of America. I shall now administer the oath to the witness.

> "Mr. Hattori, do you solemnly swear that you will tell the truth, the whole truth and nothing but the truth in answer to the several questions now to be put to you? So help you God."

Mr. Hattori: I do.

Mr. Prem: I am F. Herbert Prem, Jr. I shall now proceed to examine the witness.

1. Q. Please state your name and occupation.
   A. I am Hiroshi Hattori, Tribunal Clerk of the Arbitration Tribunal of The Japan Commercial Arbitration Association.

2. Q. How long have you held that position?
   A. Fourteen years.

3. Q. What is the business of the Arbitration Tribunal of The Japan Commercial Arbitration Association?

A. The Arbitration Tribunal is engaged in the business of providing a forum for arbitrations between the parties with respect to disputes of commercial matters.

4. Q. Do you have any duties with respect to the arbitrations that are conducted by the Arbitration Tribunal?

A. Yes.

5. Q. Please state what those duties are.

A. Among other things, I prepare and record the minutes of each session of the tribunal.

6. Q. What are minutes?

A. They are records of actions taken by the parties during each hearing of an arbitration proceeding.

7. Q. When are minutes prepared?

A. The minutes are made during the arbitral hearing and put into final form shortly after the conclusion of each hearing.

8. Q. Is it the regular course of business of the Arbitration Tribunal of the Japan Commercial Arbitration Association to prepare and record these minutes?

A. Yes.

Mr. Brem: Would you please mark this document for identification as Claimant's Exhibit 3, this date.

9. Q. I show you Exhibit 3 and ask you if you could identify that document.

A. Yes. This is a photocopy of the minutes of the Arbitration Association reflecting what took place at each of the hearings in an arbitration proceeding conducted before the Arbitration Tribunal of the Japan Commercial Arbitration Association entitled "In the Matter of Arbitration between Copal Company, Limited and Fotochrome, Inc." between the dates of December 31, 1967 and September 18, 1970.

10. Q. Are you familiar with how these photocopies were prepared?

A. Yes. They were prepared at my direction and under my supervision and they are photocopies of the original minutes which I have compared with the originals and caused the seal of the Tribunal Clerk of The Japan Commercial Arbitration Association to be impressed upon this copy indicating that these are true copies of the

minutes and of each page of such minutes.

11. Q. Were the minutes of which Exhibit 3 is a photocopy prepared by you or under your supervision and direction?

A. Yes.

12. Q. Were these minutes kept by you as part of your regular duties and as part of the regular course of business of The Japan Commercial Arbitration Association?

A. Yes.

13. Q. Are you familiar with the seal of the Tribunal Clerk of The Japan Commercial Arbitration Association?

A. Yes.

14. Q. How is it that you are familiar with the seal?

A. As Tribunal Clerk of the Arbitration Tribunal, it is frequently my duty to affix the seal to copies of the minutes.

15. Q. What does the seal indicate?

A. It indicates that these documents are true copies of the original minutes.

16. Q. Does the practice and regulations of the Japan Commercial Arbitration Association permit the originals to be taken out of Japan?

A. No. They must be retained by the Association in Japan.

Mr. Prem: I shall now remove the electromagnetic tape from the recording device and hand it to Robert A. Tsukayama, the Vice Consul of the United States, for his written certification and for its transmission by him to the Referee in Bankruptcy of the District Court for the Eastern District of New York.

CLAIMANT'S EXHIBIT 2A

SUMMARY TRANSLATION OF PROCEEDINGS IN

ARBITRATION

Claimant's Ex 2A
7/8/69

SUMMARY TRANSLATION OF PROCEEDINGS IN ARBITRATION ENTITLED "IN THE MATTER OF ARBITRATION BETWEEN COPAL COMPANY, LTD. AND FOTOCHROME, INC."

(COMMERCIAL ARBITRATION TRIBUNAL, JAPAN COMMERCIAL ARBITRATION ASSOCIATION)

At the first session of the arbitration, held on December 21, 1967, Fotochrome confirmed that it had answered on July 31, 1967.

At the third session, held on March 21, 1968, Arbitrator Kobayashi asked counsel for Fotochrome if he desired to make a statement regarding Fotochrome's supplementary brief, which had been submitted on February 1, 1968, at the second session. Counsel for Fotochrome stated that if there were no special requirement, he would prefer not to summarize the points of his brief, but stated that he would respond to questions regarding the supplementary brief. Counsel for Copal stated that he would prefer to respond to the supplementary brief by submitting a reply brief previous to the next session.

The following witnesses were examined by the Arbitral Tribunal at the sessions here indicated:

Keiji Takemoto:	6th session, October 4, 1968; 7th session, October 28, 1968; 8th session, November 11, 1968.
Shozo Takahashi:	9th session, December 17, 1968; 10th session, January 28, 1969.
Ryozo Fujino:	11th session, April 9, 1969.
Yukio Kato:	11th session, April 9, 1969.

Kazutoshi Naito:	12th session, April 10, 1969; 13th session, May 21, 1969.
Masato Kasai:	15th session, December 4, 1969; 16th session, January 27, 1970.

Counsel for Fotochrome was present at each of the above sessions.

At the 14th session, held on October 1, 1969, counsel for Fotochrome requested the examination of two prospective witnesses, Mr. Knopf and Mr. Brown. The Arbitral Tribunal stated that these two witnesses would be examined on October 31, 1969 and November 5, 1969.

At the 15th session, held on December 4, 1969, neither Mr. Knopf nor Mr. Brown appeared for examination. The Arbitral Tribunal stated that the next session would be held on January 27, 1970.

At the 16th session, held on January 27, 1970, Mr. Knopf and Mr. Brown did not appear for examination. It was the understanding of the Arbitral Tribunal and counsel for Fotochrome that if these two witnesses did not appear at the next session, the arbitration might be terminated. The Arbitral Tribunal scheduled the next session for March 31, 1970.

No evidence was submitted by Fotochrome at any session of the arbitration. Copal submitted Exhibits 1 through 39-2.

CLAIMANT'S EXHIBIT 2B

TRANSLATION OF ARBITRAL MINUTES: 17TH SESSION

Kawasaki Ex 2-B
3/31/77 FHT

IN THE MATTER OF ARBITRATION BETWEEN
COPAL COMPANY, LTD. AND FOTOCHROME, INC.

TRANSLATION OF ARBITRAL MINUTES: 17TH SESSION

Date: March 31, 1970, 2:25 P.M. - 2:25 P.M.
Place: Commercial Arbitral Tribunal, International Commercial Arbitration Association (Tokyo Commercial and Industrial Conference Building, 4th floor, 7th Conference room)
Persons present:
Arbitrators: Shunzo Kobayashi
Yoshikatsu Sakamoto
George A. Furness
Plaintiff: Copal Company, Ltd.
Attorneys for Plaintiff: Akira Shenoh
Yukitaka Sugimoto
Respondent: Fotochrome, Inc.
Attorneys for Respondent: Michael A. Braun

International Commercial Arbitration Association
Administrator: Tadatoshi Fukushima
Arbitral Tribunal Recorders: Hiroshi Hattori
Keitaro Kaneda
Interpreter: Keiko Sato

Counsel for Fotochrome presented to the Arbitral Tribunal a copy of a cable sent by Mr. Morris Winter which was received by counsel on the day of the session. Counsel explained that the cable referred to a stay order which had been issued by the Federal District Court for the Eastern District of New York. Counsel for Fotochrome further stated that he could not present his witnesses at the session, as had been previously scheduled.

Counsel for Copal stated that if the Arbitral Tribunal was of the opinion that it could continue the arbitration proceedings regardless of the fact that an order had been issued, then the tribunal should so state and schedule a date for the next session.

Arbitrator Kobayashi stated that the Arbitral Tribunal would make its decision on whether or not it would continue the arbitral proceedings after it had reviewed the stay order. The next session was scheduled for April 9, 1970 and the previously scheduled session for April 3, 1970 was cancelled.

CLAIMANT'S EXHIBIT 2C

TRANSLATION OF ARBITRAL MINUTES: 18TH SESSION

Document Ex 2 C
3/1/74

113a

IN THE MATTER OF ARBITRATION BETWEEN
COPAL COMPANY, LTD. AND FOTOCHROME, INC.

TRANSLATION OF ARBITRAL MINUTES: 18TH SESSION

Date: April 9, 1970, 2:05 P.M. - 3:15 P.M.
Place: Commercial Arbitral Tribunal
International Commercial Arbitration Association.
(Tokyo Commercial and Industrial Conference Building, 3rd floor, 3rd Conference room)
Persons Present:
Arbitrators: Shunzo Kobayashi
Yoshikatsu Sakamoto
George A. Furness
Plaintiff: Copal Company, Ltd.
Attorneys for Plaintiff: Akira Shenoh
Yukitaka Sugimoto
International Commercial Arbitration Association
Administrator: Tadatoshi Fukushima
Arbitral Tribunal Recorders: Hiroshi Hattori
Heitaro Kaneda
Interpreter: Keiko Sato

Arbitrator Kobayashi stated that counsel for Fotochrome had notified the Arbitral Tribunal in a letter dated April 8, 1970 of his discharge by Fotochrome; and that he could no longer attend the arbitral proceedings on behalf of Fotochrome. Arbitrator Kobayashi requested counsel for Copal to state his position regarding the procedure for future sessions.

Counsel for Copal stated that the stay order issued by the Federal District Court for the Eastern District of New York was without power to effect proceedings being held in Japan. He further stated that Fotochrome was absent, even

though Fotochrome could have made arrangements for substitute counsel to appear for it at the session, and that therefore the Arbitral Tribunal should proceed with the arbitration with counsel for Fotochrome absent.

The Arbitral Tribunal requested counsel for Copal to submit a brief putting forth Copal's arguments with respect to its position. Counsel for Copal stated that the brief would be submitted to the Arbitral Tribunal by May 20, 1970. The Arbitral Tribunal ordered the session adjourned and stated that a date for the next session would be scheduled once the brief had been received.

CLAIMANT'S EXHIBIT 2D

SUMMARY TRANSLATION OF ARBITRAL MINUTES: 19TH SESSION

(Kawasaki 44 2 C
3/8/77 #87) 115a

IN THE MATTER OF ARBITRATION BETWEEN
COPAL COMPANY, LTD. AND FOTOCHROME, INC.

SUMMARY TRANSLATION OF ARBITRAL MINUTES: 19TH SESSION

Date: July 2, 1970, 2:10 P.M. - 3:30 P.M.
Place Commercial Arbitral Tribunal
International Commercial Arbitration Association
(Tokyo Commercial and Industrial Conference Building. 4th floor, 7th Conference room)
Persons Present:

Arbitrators: Shunzo Kobayashi
Yoshikatsu Sakamoto
George A. Furness
Plaintiff: Copal Company, Ltd.
Attorneys for Plaintiff: Akira Shenoh
Yukitaka Sugimoto
International Commercial Arbitration Association
Administrator: Tadatoshi Fukushima
Arbitral Tribunal Recorders: Hiroshi Hattori
Kenzo Nakata
Interpreter: Torao Kawazaki

The Arbitral Tribunal requested counsel for Copal to leave the conference room. Then, the Arbitrators consulted on how they would handle two cables which had been received from Fotochrome. They also discussed the progress of the arbitration. It was then decided to proceed with counsel for Fotochrome absent, as had been done previously.

Arbitrator Kobayashi stated that the Arbitral Tribunal would close the arbitration at the present session. He asked counsel for Copal if an extension of time beyond 30 days would be acceptable to Copal in the case that additional time was necessary for the preparation of the arbitration award.

Arbitrator Kobayashi ordered that the arbitration be closed.

DECISION AND ORDER OF REFEREE IN BANKRUPTCY

FILED
AUG 1 1973
C. ALBERT PARENTE
REFEREE IN BANKRUPTCY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In the Matter of

FOTOCHROME, INC.,

Debtor.

Bankruptcy No. 70-B-209

D E C I S I O N

BEFORE: HONORABLE C. ALBERT PARENTE,
Referee in Bankruptcy

APPEARANCES: LOUIS P. ROSENBERG, Esq.
Attorney for the Debtor
16 Court Street
Brooklyn, N.Y. 11201

WHITMAN & RANSOM, Esqs.
Attorneys for the Claimant
522 Fifth Avenue
New York, N.Y. 10036

FILED
NOV 14

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Fotochrome, Inc. (hereafter 'FOTO') on the 26th day of March, 1970, filed a petition for an arrangement pursuant to Chapter XI of the Bankruptcy Act and came under the jurisdictional umbrella of the Bankruptcy Court.

#26

Antecedent to the filing, FOTO as the Respondent, and Copal Company, Limited as the Petitioner (hereafter 'COPAL'), in comport with Article XII (arbitration clause) of a certain agreement dated April 25, 1966, proceeded to arbitration before the Japan Commercial Arbitration Association in Tokyo, Japan (hereafter 'JAPAN CAA') to resolve a dispute arising between the parties relative to a breach of said contract. The contract called for the purchase by FOTO of a large quantity of a unique still camera which COPAL had undertaken to manufacture. COPAL asserted damages in the sum of $631,528.07 purportedly sustained as a result of FOTO's refusal to accept or pay for cameras manufactured in accordance with the terms of the contract. FOTO interposed a counterclaim in the sum of $930,000.00 contending that COPAL breached its contractual obligation by producing a defective camera which could not be sold.

Prior to the full completion of the arbitration hearing but very close to the conclusion thereof, FOTO filed a Chapter XI petition, as above stated.

On the 27th day of March, 1970, and before the finalization of the arbitration hearings, my predecessor, Honorable

Sherman D. Warner, issued an order continuing FOTO in possession as the debtor in possession. The body of the order contained inter alia the injunctive provision following:

> "That until the further order of this Court, all creditors of the debtor, including their agents, servants and employees and any Marshal of the City of New York and Sheriff of the State of New York, acting in their behalf or in the furtherance of their claims, be and they are hereby restrained and enjoined from commencing or continuing any actions, suits, arbitrations, or the enforcement of any claim in any Court against this debtor or taking any further steps or proceedings except before this Court." (Emphasis supplied)

Certified copies of the Court's order were duly served upon COPAL and the JAPAN CAA. COPAL did not seek a review of the Referee's order. Notwithstanding the Court's restraining proviso, COPAL pursued the arbitration hearing to a conclusion unilaterally. The JAPAN CAA, expressing uncertainty as to what procedural course it should follow, ultimately decided to conclude the hearing ex parte expressing doubt, however, as to the binding effect of their award in light of the Chapter XI filing by FOTO and the restraining order of the Bankruptcy Court. (See minutes of the JAPAN CAA hearings exemplified by Robert A. Tsukayama, Vice Counsel of the United States).

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On September 18, 1970, approximately six months after the filing of the petition, the JAPAN CAA rendered its award in favor of COPAL. Damages were fixed in the sum of $624,457.80 with interest at six percent per annum from January 1, 1967 to date of payment in full. FOTO's counterclaim against COPAL was dismissed. Costs were assessed at $6,659.66 prorated as follows:

Ninety percent to FOTO

Ten percent to COPAL

COPAL, the recipient of the award, did not take any steps to confirm same by entry of judgment, pursuant to § 7514 of the CPLR or Title 9, § 9 of the U.S. Code Annotated. In lieu thereof, on October 22, 1970 COPAL filed a proof of claim with the Bankruptcy Court based upon the sum total of the award. FOTO, as the debtor in possession, demurred to the validity of the award and filed objections to the claim. In adjunct thereto FOTO petitioned the Bankruptcy Court to relitigate merits of the claim and its counterclaim. The thrust of COPAL's contention in esse is as follows:

1. The Bankruptcy Court is not empowered to stay arbitration hearings

2. The Bankruptcy Court lacked in personam jurisdiction over COPAL and/or the JAPAN CAA; ergo, the Bankruptcy Court's stay order had no extra territorial effect

3. That the doctrine of estoppel obtains since the subject matter of the controversy and the parties involved therein were subject to the laws of Japan

FOTO, in diametric posture to COPAL's contention, asserts the following:

1. The Bankruptcy Court was inherently empowered to issue the restraining order effectively staying the arbitration hearing

2. That in view of the fact that the award followed the commencement of the bankruptcy proceeding it is not binding against the debtor in possession

The relatively simple, factual situation herein unfolds into a multifaceted issue opening a Pandora's box of questions touching upon the conflux of bankruptcy and arbitration law; the jurisdiction of the Bankruptcy Court; conflict of laws; and the enforcement of international arbitration awards and/or judgments.

Arbitration, as the medium to resolve commercial enterprise disputes, has burgeoned in the past decade. Constant therewith the law of arbitration, for the most part, is clearly defined. The area in which arbitration and bankruptcy law converge, however, appears to be an unchartered sea. There is a dearth of law on the subject, particularly with reference to agreements for

the arbitration of disputes between U.S. parties and foreign entities in juxtaposition with the Bankruptcy Act.

Section 26 of the Bankruptcy Act and General Order 33 contain the sole statutory reference covering arbitration. It is provided therein that the Receiver or Trustee in Bankruptcy may, pursuant to the direction of the Court, submit to arbitration any controversy arising in the settlement of the estate. This section is operative only in the absence of a contractual provision to arbitrate - Tonin v Plein, C.A.N.Y. 1962, 301 F. 2d, 378; Shilling v Canadian Foreign S.S. Co., D.C.N.Y. 1961, 190 F. 2d 462. Relief under § 26 is subject to the Court's discretion. Section 26. c. provides that the award "shall have like force and effect as the verdict of a jury". Thus, an arbitration award rendered thereunder is reviewable on the merits by the Bankruptcy Court - In re McLam, D.C. Vt. 3 Am B.R. 245, 97 F. 922.

With reference to contracts containing arbitration provisions entered into prior to bankruptcy, the law takes a dichotomous course, viz., if the claim is asserted in behalf of the Bankrupt then it is judicially sanctioned - Plein v Chuchat, 17 A.D. 2d 25, 230 N.Y.S. 2d, 633. On the other hand, if the

claim is against the Bankrupt's estate, the issue may not be submitted to arbitration without the consent of the Receiver or Trustee further subject to the authorization of the Bankruptcy Court - Matter of Maimon Publishing Co., Inc., 34 Am. B.R. (N.S.) 786.

The rationale exposited by the foregoing expression of law is anchored to the concept that enforcement of arbitration would affect and, in some measure, determine the assets of the Bankrupt's estate available for distribution; hence, interfering with the interest of parties not privy to the contract and who never consented to arbitration; namely, the Trustee and the general creditors.

The courts have, however, compelled arbitration over the objection of the Trustee if the factual circumstances show that claims against the bankrupt estate can be paid without diminishing the assets of said estate - Matter of Grain Products Corporation, 34 Am. B.R. (N.S.) 81, 20 F.S. 134 (S.D.N.Y. 1937).

Albeit, the foregoing analysis of § 26 has a measure of application to the issue at bar. It does not encompass a

specific or satisfactory resolve of the multi-dimensional question in issue which is hereinbelow distilled into three fundamental parts --

1. Does the Bankruptcy Court have authority to enjoin an international arbitration tribunal?

2. Was the arbitration award rendered by the international arbitration tribunal equivalent of a judgment?

3. Does the Bankruptcy Court have the power to look behind the judgment relitigating the merits thereof, or must it allow the claim as filed?

The plural composition of the issue favors a dispositive finding ad seriatim:

The statutory criteria appertaining to the first prong of the question embraces the following pertinent parts:

Section 314 of the Bankruptcy Act provides as follows:

> "The court may, in addition to the relief provided by § 11 of this Act and elsewhere under this chapter, enjoin or stay until final decree the commencement or continuation of suits other than suits to enforce liens upon the property of a debtor, and may, upon notice and for cause shown, enjoin or stay until final decree any act or the commencement or continuation of any proceedings to enforce any lien upon the property of a debtor."

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Section 11a of the Bankruptcy Act, provides, in part, as follows:

> "Suits By and Against Bankrupts. a. A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition by or against him, shall be stayed until an adjudication or the dismissal of the petition; if such person is adjudged a bankrupt, such action may be further stayed until the question of his discharge is determined by the court after a hearing, or by the bankrupt's filing a waiver of, or having lost, his right to a discharge, or, in the case of a corporation, by its failure to file an application for a discharge within the time prescribed under this Act ... ."

Section 311 of Chapter XI of the Bankruptcy Act provides:

> "Where not inconsistent with the provisions of this chapter, the court in which the petition is filed shall, for the purposes of this chapter, have exclusive jurisdiction of the debtor and his property, wherever located."

Section 302 of Chapter XI provides, in part, as follows:

> "The provisions of chapters I to VII, inclusive, of this Act shall, insofar as they are not inconsistent with or in conflict with the provisions of this chapter, apply in proceedings under this chapter."

Accordingly, since it does not appear to be inconsistent with Section 314 or with any other provision of Chapter XI, Section 2a(15) is applicable. Said section authorizes courts of bankruptcy to:

> "(15) Make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this Act: Provided, however, That an injunction to restrain a court may be issued by the judge only."

The context of the above statutes explicitly confers upon the Bankruptcy Court exclusive jurisdiction over the debtor and his property wherever located, together with broad injunctive powers to preserve its paramount jurisdiction.

'Collier on Bankruptcy', Volume 1, ¶2.61, pages 322, 323, contains a pandect of § 2a (15) of the Bankruptcy Act wherein it is stated as follows:

> "Clause (15) is an omnibus provision in such general terms as to be the basis for a broad exercise of the power in the due administration of a bankruptcy proceeding. The most important and frequent example of this exercise is the use of the power to enjoin or restrain the actions of others. While such power is probably inherent in the Bankruptcy Court as a court of equity (Clause 15) gives it express legislative sanction." (emphasis supplied)

Corollary thereto the courts have held, practically in unanimity, that a Referee in Bankruptcy has the authority to stay parties to a suit, if not the power to enjoin a court - Gatell v. Millian, 2 F. 2d 365 (1st Cir. 1924); Music Master Corporation, 15 F. 2d 860, 861 (E.D.N.Y. 1926); Steelman v. All Continent Corporation, 301 U.S. 278 (1936); Martin, 78 F. Supp. 433 (E.D.N.Y. 1948).

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In extension of the foregoing doctrine, the Court in the case of In Re Dana,167 Fed. 529, 530 (8th Cir. 1909) held as follows:

> "The injunction in this case ran, not only against the parties to the suit in the state court, but also against the state court itself and the judge. Assuming, without deciding, that power exists so to extend the writ, clearly it should never be exercised, except in case of imperative necessity. An injunction operating upon the litigants alone will rarely fail to accomplish all that is needed, and it should not be anticipated that a judge of a state court will of his own motion insist upon proceeding after the parties in interest have been restrained by a court whose jurisdiction in the particular matter is paramount. A considerate regard for the dignity of the courts of the states, so essential to harmony in our intricate judicial systems, forbids an assumption that they will not be equally solicitous to observe the Constitution and laws of the United States, which constitute the supreme law of the land binding upon all the courts."

Thus, the composite weight of authority as reflected in the above decisions is patently to the effect that a Referee in Bankruptcy cannot enjoin a court. The reasoning in re Dana, supra, however, elicits a pragmatic concept which I deem rationally compelling in the case at bar, viz., that the JAPAN CAA should not have continued with the arbitration hearing after being served with the restraining order from the Bankruptcy Court whose jurisdiction

was paramount. Moreover, there is some doubt as to whether an irregular tribunal - not judicial, should be accorded the mantle of a court.

Notwithstanding the above, COPAL challenges the Court's authority to stay arbitration proceedings asserting that the provisions of § 314 of the Bankruptcy Act are definitively absolute so as to restrict the power of the Court to the stay of "suits" only insisting that the Court's power doesn't extend to arbitration hearings. Surprisingly, both 'Remington on Bankruptcy' and 'Collier on Bankruptcy' support COPAL's position. 'Remington on Bankruptcy', § 3257, treats the issue as follows:

> "Arbitration proceedings without court sanction have been considered not stayable as suits"

Likewise, 'Collier on Bankruptcy' (14th Edition) ¶11.03, in discussing the term "suit" states:

> "The term, however, does not include arbitration proceedings"

Ostensibly, COPAL and both Remington and Collier posited their findings upon a decision of very early vintage decided by Referee Davis in the Southern District of New York;

namely, the Matter of Markowitz Co., Inc., 6 Amer. B.R. (N.S.) 221, wherein Referee Davis held as follows:

> "It does not seem to me that the arbitration proceeding instituted before the bankruptcy between the bankrupt and one of its creditors is a suit within the language of the Bankruptcy Act."

Having the utmost regard for the opinion of the late Referee Davis and the eminent authorities on bankruptcy law, I nevertheless venture to say that were I to follow their thesis and adhere to their findings I would perpetuate error. The restrictive limitation ascribed to the generic term "suits" so as to exclude arbitration is neither plausible nor persuasive. Adopting such a narrow definition would contravene the express purpose and intent of § 2 of the Bankruptcy Act. Moreover, in a more recent opinion, viz., Madawick v Travellers' Insurance Co., 114 N.Y.S. 300, Judge Hill disposed of the tortured reasoning and semantic limitation of the word "suits" as follows:

> "It seems to me that the word "suit" is a broad term including arbitration." Affirmed 307 N.Y. 111

Premised upon the context of the above precepts, I make the following dispositive findings:

1. That the restraining order of my predecessor was jurisdictionally effective and binding upon the parties engaged in the arbitration proceeding and the JAPAN CAA.

2. That the JAPAN CAA should not have continued the arbitration hearing ex parte in light of the injunctive provision and the paramount jurisdiction of the Bankruptcy Court.

3. That the post-filing award of the JAPAN CAA is deemed a nullity and found to be not binding against the debtor in possession.

Adverting to the second prong of the three-fold issue, I will assume arguendo that Section 307 (2) of the Bankruptcy Act is inapplicable and, further, that the Court lacked authority to stay the arbitration tribunal. Predicated upon the foregoing assumed posture § 63a of the Bankruptcy Act (debts which may be proved) comes into focus. The pertinent parts thereof follow:

> "Debts of the bankrupt may be proved and allowed against his estate which are founded upon (1) a fixed liability, as evidence by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition by or against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest;

> "(5) provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interest accrued after the filing of the petition and up to the time of the entry of such judgments... ."

The statutory content above cited clearly imposes a condition precedent to the validation of a debt as a provable claim against a bankrupt estate. Constant therewith the award of the JAPAN CAA had to be the equivalent of a judgment to fall within the purview of either Subdivision (1) or (5) of § 63a of the Bankruptcy Act. Arbitration awards rendered in New York do not ipso facto equate to judgments. Confirmation thereof by the New York State Supreme Court or the U.S. District Court is a vital prerequisite to sustain the transposition of arbitration awards into judgments.

Section 63a (1) is particularly cogent to the issue as a dispositive force factor herein in light of the fact that GORA's claim was not a fixed liability absolutely owing at the time of the filing of the petition - Royal Baking Powder Co. v. Hessey, 76 F. 2d 645 (4th Cir. 1935). Insofar as § 63a (5) is concerned, the applicable provisions thereof are central to the question of whether the award of the JAPAN CAA comprised a provable

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debt reduced to judgment after the filing of the petition - United States v. Paddock, 180 F. 2d 121 (5th Cir. 1950).

The Court pursued the conflict of laws aspect inherent to the issue by holding a hearing relative thereto on March 8, 1973. COPAL called Seiichi Yoshikawa, Esq., a member of the Japanese Bar, as its witness. Said attorney, reading from the Japanese Code of Civil Procedure No. 29 of 1890, testified that an arbitration award under Japanese law has the same effect as a judgment. Interrogation by the Court elicited from the witness the fact that a judgment emanating from a foreign court is enforceable in Japan only after confirmation, pursuant to Japanese law. Subsequent to the hearing and in conjunction therewith, the Court requested and obtained from the Counsel General of Japan a copy of the Law of Civil Procedure translated into English. Book VIII, Arbitration Procedure, Article 800, states as follows:

> "As between the parties the award has the effect of a final and conclusive judgment of a court of justice."

Apposite to the above subject matter, the Court took judicial notice of the fact that the United States is a signatory

to a bilateral Treaty of friendship, navigation and commerce with Japan - 4 U.S.T., 2063 TIAS 2863 and 206 UNTS 143. Said Treaty accords recognition and gives legal efficacy to agreements containing arbitration clauses between United States nationals and companies and Japanese nationals and companies - Oregon Pacific Forest Products Corp. v. Welch Panel Co., 248 F. Supp. 903 (1965); Associated Metals and Minerals Corp. v. The Steamship Mihah's Angelos, 234 F. Supp. 236 S.D.N.Y. (1964).

Tangentially, it is to be noted that effective February 1, 1971 the United States under the auspices of the United Nations, along with 37 other nations, ratified the United Nations Convention pertaining to the enforcement of foreign arbitral awards - U.S. Doc. No. E/CONF. 26/9 Rev. 1, 6/10 (1958). Pursuant to the terms thereof international arbitration awards attain the status of judgments enforceable in the federal courts summarily. The substantive impact of the treaty extends the concept of comity and reciprocity so as to dispel the uncertainty as to the legal effect of foreign arbitration awards -- Aksen: "American Arbitration Accession Arrives in the Age of Aquarius: United States Implements United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards"

(Southwestern University Law Review, Volume 3, Number 1).

In view of the fact that the effective date of said treaty is subsequent to the filing herein the provisions thereof do not specifically encapsule the subject matter at bar. It does, however, serve to punctuate the fact that prior to the ratification of the treaty by the United States federal courts were not bound to give recognition to such awards absent the incidence of confirmation.

Premised upon the above factual and legal concepts, I find that the award of the JAPAN CAA constituted a conclusive judgment as between the parties in Japan (emphasis added).

The remaining prong of the issue turns on whether the Bankruptcy Court is empowered to look behind the "judgment", or on whether the award is res adjudicata as a judgment.

That the Bankruptcy Court has the power to review the circumstances surrounding the entry of judgment is unquestionable -- Pepper v. Litton, 308 U.S. 295 (1939).

It is well settled that a judgment rendered after the filing of the bankruptcy petition is not provable notwith-

standing the fact that the verdict or findings of fact and conclusions of law upon which the judgment is subsequently granted are made prior to the filing of the petition -- Coclin Tobacco Co. v. Griswold, 408 F. 2d 1338 (1st Cir. 1969); In re Kroeger Bros., 262 Fed. 463 (E.D. Wisc. 1920).

In the Coclin Tobacco case, supra, a decision on a tort claim was rendered by a state court prior to the filing of the bankruptcy petition, but the judgment was rendered thereafter. The court of appeals affirmed the disallowance of the claim stating: "It is clear that under New York law a judgment is not final until entered."

In the case of Lane v. Industrial Commissioner of State of New York, 54 F. 2d 338 (2d Cir. 1931), cert. denied Industrial Commissioner of State of New York v. Irving Trust Co., 286 U.S. 543 (1932), it was held that a compensation award rendered prior to bankruptcy was not a provable claim. The court, in the body of its decision, stated the following: 'It appears that awards were made to the claimants, but no judgments have been entered thereon. An award is not equivalent to a judgment." It is to be noted, however, that § 63a was amended so as to specifically make compensation awards provable as claims in the Bank-

ruptcy Court. Accordingly, it was held in Nathanson v. N.L.R.B., 344 U.S. 25, 30 (1952), that .. "where the matter in controversy has been entrusted by Congress to an administrative agency, the Bankruptcy Court normally should stay its hand pending an administrative decision." The JAPAN CAA, of course, is not an administrative agency created by Congress but merely a tribunal agreed to by the parties. The Nathanson case, supra, therefore is not per se relevant to our factual situation. The import of this case pertains to the fact that it is definitive of singular exceptions to the general rule of law appertaining.

The court, however, cognizes the maxim that generally under the provisions of § 63a (5) of the Bankruptcy Act, claims founded on provable debts reduced to judgment after the filing of the petition, but before the consideration of the bankrupt's application for discharge, are provable and allowable -- United States v. Paddock, 180 F. 2d 121 (5th Cir. 1950), cert. denied 340 U.S. 813 (1950), and In Re Anton, 11 F. Supp. 345 (D. Minn. 1935).

In re Anton, supra, the court after noting that the creditor commenced suit prior to bankruptcy on a valid and provable

FOTOCHROME, #70-B-209

claim, viz., a promissory note, held that the judgment rendered thereafter could be the basis of a claim in the bankruptcy proceeding barring a contest on the merits. After noting, as had the court in the Paddock case, supra, that the state supreme court is not obligated to take judicial notice of the bankruptcy proceeding and that the pendency of said proceeding must be pleaded and proved, the court in Anton indicated that "nothing that was done in the Bankruptcy Court had ousted the jurisdiction of the court to enter judgment on the verdict rendered ... ." 11 F. Supp. at 346. In the case at bar, the Bankruptcy Court did take action to oust the tribunal of jurisdiction, i.e., it issued an injunction which, regardless of its effectiveness, was before the tribunal prior to its rendering the award.

The court in Anton, supra, and other courts have construed § 63a (5) to mean that provable debts reduced to judgment after the filing of petition may be proved by such judgment interdicting any contest on the merits -- In re McBryde, 99 Fed. 686 (E.D. Mo. Car. 1899).

The courts in both the Anton and McBryde cases relied upon the decision of the United States Supreme Court in Boynton v.

Ball, 121 U.S. 457 (1887). In the Boynton case, the state court action was instituted prior to bankruptcy but the judgment was rendered thereafter. The bankrupt later obtained a discharge and then moved to stay execution on the judgment perpetually. The Supreme Court affirmed the decision denying the stay indicating that:

> "... where the bankruptcy proceedings are brought to the attention of the court in which a suit is being prosecuted against a bankrupt, that court shall not proceed to final judgment until the question of his discharge shall have been determined. The state court could not know or take judicial notice of the proceedings in bankruptcy unless they were brought before it in some appropriate manner, ... but the proceedings may, upon the application of the bankrupt, be stayed to await the determination of the court in bankruptcy on the question of his discharge." 121 U.S. at 466-67.

The court in Boynton, supra, then limited its decision to situations where the state court did not receive actual notice of the bankruptcy proceeding and where no action was taken in the bankruptcy court to stay the state court proceeding. The thrust of the above cases implicitly specify that a state court judg-

ment will be provable only where the bankruptcy court has taken no action to prevent the entry of judgment or has directed the state court proceeding to go forward pursuant to § 57d of the Bankruptcy Act.

Section 57d of the Bankruptcy Act provides as follows:

> "Claims which have been duly proved shall be allowed upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest or unless their consideration be continued for cause by the court upon its own motion: Provided, however, That an unliquidated or contingent claim shall not be allowed unless liquidated or the amount thereof estimated in the manner and within the time directed by the court; and such claim shall not be allowed if the court shall determine that it is not capable of liquidation or of reasonable estimation or that such liquidation or estimation would unduly delay the administration of the estate or any proceeding under this Act."

The weight of authority correlates to the effect that a judgment rendered by a court, other than a bankruptcy court, after the filing of a petition, to be provable under § 63a (5) so as to be conclusive on the merits of the claim, must be made in compliance with the provisions of the Bankruptcy Act -- In re Paramount Publix Corporation, 85 F.2d 42 (2d Cir. 1936); Marks v. Brucker,

434 F.2d 897 (9th Cir. 1970); In re Barrett & Co., 27 F.2d 159 (S.D. Gas. 1928) aff'd., Rhodes v. Elliston, 29 F.2d 737 (5th Cir. 1928); In re James A. Brady Foundry Co., 3 F.2d 437 (7th Cir. 1924); In re Service Appliance Co., Inc., 39 F.2d 632 (N.D.N.Y. 1930).

In the Paramount case, supra, the Court of Appeals for the Second Circuit affirmed the District Court stating:

> "... We take it as law that a judgment obtained after bankruptcy petition filed (sic) does not liquidate a claim for purposes of distribution (citing authorities). The fact that Section 63b Bankr. Act (11 U.S.C.A. §103(b) (now §57d), allows unliquidated claims to be liquidated 'in such manner as it' (the court) 'may direct,' would seem to give it control over liquidation. (citing statute). Therefore, except for the reorganization proceeding, the judgment creditor would have had to prove his claim before the referee, or in some other way chosen by the court under Section 63b (now 57d)."

In Barrett & Co., 27 F. 159 (S.D. Ga. 1928) the claimant brought suit in the state court on June 26, 1923. On July 30, 1923 Barrett & Co. was adjudged bankrupt. Barrett & Co. appeared in the state court action and interposed an answer pleading the pending bankruptcy proceeding as a defense and praying for a stay of said action. The trustee received notice of the action, appeared in the state court, but refused to participate in

FOTOCHROME, #70-B-209

the trial. A judgment was entered in the state court in favor of Rhodes, who then filed a claim based on the judgment. The trustee objected to the claim. The referee allowed the claim pursuant to § 63a (5) and precluded any inquiry into the merits thereof. The District Court, in reversing the referee's decision, reasoned as follows:

> "The Bankruptcy Act (11 USCA), passed in pursuance of the Constitution, is part of the supreme law of the land, superseding principles of general jurisprudence and state statutes, if in conflict with them.
>
> "Merely personal judgments against the bankrupt, rendered after the adjudication and after the rights and liabilities of the bankrupt estate have become fixed, the trustee being no party to them, should reasonably not bind the trustee nor the estate." 27 F.2d at 160
>
> "A personal suit against the bankrupt is not abated, though it may, if on a provable debt, be temporarily stayed pending bankruptcy. The court does not judicially notice the bankruptcy proceeding, but it must be pleaded and proved. *** But in such personal suits the jurisdiction which the trial court retains after bankruptcy is only what it had before - a jurisdiction over the person of the bankrupt. The jurisdiction over his property and its burdens has passed to the bankruptcy court. Nothing that the bankrupt thereafter does or suffers to be done can affect them.
>
> "To make a fair and equal distribution of the estate to creditors through the federal

FOTOCHROME, #70-B-209

courts is a prime object of the Bankruptcy Act. To accomplish it, it is just as important that the claims of the distributees be ascertained by the bankruptcy tribunal as that the bankrupt's property should be collected by it. That the distribution should be controlled by the judgments of other courts in any jurisdiction where the bankrupt can be served, the creditor perhaps selecting a favorable forum, and the bankrupt perhaps playing favorites in defending, would be most unfortunate. Even if notice and opportunity to defend be given the trustee, much embarrassment would, and much injustice might ensue.

"The provable debts reduced to judgment after the filing of the petition, mentioned in § 63a (5), do not include all such judgment rendered against the bankrupt. *** But I am persuaded that only provable debts reduced to judgment after the filing of the petition pursuant to the provisions of the Act are meant [Court's emphasis]. One such provision for reduction to judgment occurs in § 63b (11 USCA §103(b) [now §57d], immediately following: 'Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct.' [Court's emphasis]. Liquidation by the trial of a suit, if so directed, would result in a provable judgment. Liquidation by a trial against the wish of the bankruptcy court, and without the participation of its trustee, would not. (Emphasis supplied). 27 F.2d at 161

The liquidation of the claim in the subject proceeding was against the wish of the bankruptcy court" as evidenced

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by the issuance of the stay order, whatever the legal effect thereof may have been.

The tenets of law gleaned from the aggregate authority above cited elicits the following findings:

1. That the Bankruptcy Court is empowered to look behind a judgment to ascertain on the merits the nature of the debtor's liability.

2. That the Bankruptcy Court by the issuance of a restraining order effectively imposed its paramount authority over the estate of the debtor in possession ousting the jurisdiction of the JAPAN CAA.

3. That the arbitration award rendered by the JAPAN CAA was not self executing as a judgment in the United States so as to be binding upon the debtor in possession.

4. That the filing of the subject claim by COPAL subjected said claim to the scrutiny of the Bankruptcy Court for all purposes.

5. That the contentions advanced by COPAL are rejected as legally inapposite.

FOTOCHROME, #70-B-209

This memorandum shall constitute my Findings of Fact and Conclusions of Law under §39a, sub. (a), G. O. 47, and Rule 52a Fed. R. Civ. P.

IT IS, THEREFORE, ORDERED that the debtor in possession is entitled to a hearing on the objection to COPAL's claim.

IT IS FURTHER ORDERED that said hearing on objection come on to be heard before this Court on the 11th day of September, 1973, at 10:30 A.M.

DATED: July 31, 1973

C. ALBERT PARENTE
Referee in Bankruptcy

Copies mailed this day to each of the following:

Louis P. Rosenberg, Esq.
Attorney for Debtor
16 Court Street
Brooklyn, N.Y. 11201

Whitman & Ransom, Esqs.
Attorneys for Claimant
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New York, N.Y. 10036

DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D. N.Y.
★ 4 1974 ★
TIME A.M. ✓
P.M.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- x

In the Matter of

FOTOCHROME, INC.,

Debtor.

70 B 209

M'FILMED

- x

APPEARANCES:

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MEMORANDUM AND ORDER

WEINSTEIN, D. J.

#40

The litigants have joined issue where the laws of bankruptcy, foreign arbitration, jurisdiction and judgment recognition overlap. Although the result is troubling, for the reasons indicated below we hold that, in the circumstances of this case, pending foreign arbitration proceedings are not subject to stays by a bankruptcy judge. We recognize that this holding may prefer foreign to American creditors in a limited class of cases.

I. FACTS

Fotochrome, Inc., a New York corporation, fell into dispute with Copal Co., Ltd. -- a Japanese corporation apparently neither present nor doing business in the United States -- over the terms of an agreement to manufacture special cameras in Japan. Copal sought damages of $631,528.07 for Fotochrome's failure to pay; Fotochrome claimed $930,000.00 for defective cameras.

Under a provision in their contract, the parties proceeded to arbitration before the Commercial Arbitration Association in Tokyo, Japan. All the evidence was presented in thirteen days of hearings, both parties being represented by local counsel.

On March 26th, 1970, while the parties were awaiting issuance of an award by the Arbitration Association, Fotochrome filed a Chapter XI arrangement in the Eastern District of New York. The bankruptcy judge issued the usual order the next day continuing the debtor in possession and staying all proceedings, including pending arbitrations, by creditors under the authority of section 11(a) of the Bankruptcy Act. 11 U.S.C.A. § 29(a). He ruled:

> "That until the further order of this Court, all creditors of the debtor, including their agents, servants and employees and any Marshal of the City of New York and Sheriff of the State of New York, acting in their behalf or in the furtherance of their claims, be and they are hereby restrained and enjoined from commencing or continuing any actions, suits, arbitrations, or the enforcement of any claim in any Court against this debtor or taking any further steps or proceedings except before this Court."
> In the Matter of Fotochrome, Inc., Decision p. 3 (Emphasis added.)

After certified copies of this order were delivered to Copal and the Commercial Arbitration Association in Japan, Fotochrome "withdrew" from the arbitral proceedings.

Undaunted, the Arbitration Association published its decision in favor of Copal on September 18, 1970. It awarded

damages in the sum of $624,457.80 with interest and divided costs between the parties. Copal entered judgment on its award in Japan and filed a proof of claim here in the Eastern District of New York. It never entered judgment on the award in an American court on the theory that it was constrained in this country by the stay of March, 1970.

Upon the strength of the stay, the bankruptcy judge refused to recognize the finality of the arbitral award to Copal and ruled that he had power to rehear the issues of liability de novo. This appeal followed.

II. JURISDICTION OF THE BANKRUPTCY COURT

It is not surprising that the Japanese Commercial Arbitration Association made its award despite the bankruptcy court order. Our courts were bereft of any basis to exercise in personam jurisdiction over Copal -- much less the Arbitral Association -- in this case until after proceedings in Japan had terminated and Copal filed its claim here.

Section 2(a) of the Bankruptcy Act (11 U.S.C. §11(a)) codifies a fundamental rule for all American courts requiring some basis of jurisdiction over the person of the party it seeks to bind. The provision reads:

> "The Courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this title . . . , to . . . (15) Make such orders, issue such process . . . as may be necessary for the enforcement of the provisions of this title . . . ."
> 11 U.S.C. § 11(a)(15).
> (Emphasis added.)

By providing, under section 311 of the Bankruptcy Act (11 U.S.C. § 711), that the court in which a bankruptcy petition is filed shall have "exclusive jurisdiction of the debtor and his property, wherever located", Congress indicated that a Chapter XI court would have the power to send its process beyond the boundaries of its district to protect its jurisdiction. See Continental Illinois National Bank & Trust Co. v. Chicago, R.I. & P. Ry. Co., et al., 294 U.S. 648,682-84, 55 S.Ct.595,609 (1935) (construing the predecessor statute § 77; civil process "in any other district"); see also In re Greyling Realty Corp., 74 F.2d 734,737-38 (2d Cir.),cert.denied sub nom Troutman v. Compton, 294 U.S. 725, 55 S.Ct. 639 (1935); 8 Collier on Bankruptcy, 3.03 at 183-188 (14th ed. 1971). But

no authority has construed that power to extend beyond the territorial limits of the United States to control the action of parties and tribunals without some independent basis of jurisdiction over them. Cf. Advisory Committee's Notes to Bankruptcy Rule 111, eff. October 1, 1973.

The Chapter XI Court, though graced with nationwide jurisdiction, is still bound in extranational matters by the well established "minimum contacts" principle enunciated in Hanson v. Denckla, 357 U.S. 235, 78 S.Ct. 1228 (1958). There the Supreme Court held:

> "However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the 'minimal contacts' with that State that are a prerequisite to its exercise of power over him."
> 357 U.S. at 251, 78 S.Ct. at 1238.

See, also, Mariash v. Morrill, et al., F.2d , slip opinion No. 899 at 3406-08 (2d Cir. May 10th, 1974); Leasco Data Processing Equipment Corp. v. Maxwell, 468 F.2d 1326, 1339-1342 n. 11 (2d Cir. 1972) (minimal contacts principle applies to extraterritorial service upon foreign defendants under the Securities Exchange Act of 1934). Here, neither the Japanese corporation nor the Japanese Arbitration Association had, so far as this record shows, the minimal contacts essential

to the exercise of jurisdiction by the bankruptcy judge.

III. RECOGNITION OF THE ARBITRAL AWARD

Under Japanese law the award is final. Federal Rule of Civil Procedure 44.1 and N.Y.C.P.L.R. 4511 permit notice of those Articles of the Japanese Code of Civil Procedure providing for deposits of arbitral awards in Japanese courts.

> "Article 799: An award shall contain an entry of the day, month, and year when it was drawn up and arbitrators shall sign and seal thereon.
>
> 2. An exemplification of the award bearing the signatures and seals of the arbitrators shall be served upon the parties and the original thereof shall be deposited with the jurisdictional court together with a certificate of service."

Once the award is deposited with the Japanese court, it is subject to no further confirmation proceedings. At that point under Article 800, the effect of the award is conclusive.

> "Article 800: An (arbitral) award shall have the same effect as a judgment which is final and conclusive between the parties."

Copal was unable to confirm its award as a judgment in our courts in the face of the Referee's order which apparently barred any further action against the bankrupt in this country. The Japanese Corporation now asks that it be

allowed to enforce its Japanese award in this country so that it will be a provable debt for the purposes of the Bankruptcy Court. Bankruptcy Act §63(a)(5), 11 U.S.C.§103(a)(5)).

In support of its right to enforcement, Copal invokes two treaties, one bilateral, the other multilateral, to which both the United States and Japan are parties. The bilateral treaty at least has been held to be self-executing. See Oregon-Pacific Forest Products Corp. v. Welsh Panel Co., 248 F.Supp. 903, 910 (D.C. Oregon 1965) (state law must yield to arbitration provisions of treaty with Japan); L. Henkin, Foreign Affairs and the Constitution, 157 n. (1972). Under the Treaty with Japan on Friendship, Commerce and Navigation, conclusive Japanese arbitration awards which do not violate our public policy are conclusive in this country as well.

> "Awards duly rendered pursuant to any such contracts, which are final and enforceable under the laws of the place where rendered, shall be deemed conclusive in enforcement proceedings brought before the courts of competent jurisdiction of either Party, and shall be entitled to be declared enforceable by either such courts, except where found contrary to public policy."
> Treaty with Japan on Friendship, Commerce and Navigation, Art. IV, para. 2, 4 U.S.T. 2063 at 2068, T.I.A.S. 2863 at 7 (April 2, 1953). (Emphasis added.)

Recognition of such foreign arbitral awards are mandated under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, being treated much like a judgment under the Full Faith and Credit clause of the United States Constitution.

> "Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of the arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards."
> United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Art. III, 21 U.S.T. 2517 at 2519, T.I.A.S. 6997 at 3, 330 U.N.T.S. 38 at 40 (Dec. 29, 1970). (Emphasis added.)

The United States acceded to the United Nations Convention more than four years after the contract here in question was signed and shortly after the award was made. Nevertheless, it is likely that the treaty controls enforcement actions commenced after the effective date of the Convention, even if the foreign proceedings and award predated the Convention.

> "One important point is that the convention contains no prospective language and, therefore, should be construed as applying retroactively to arbitration agreements and awards previously existing."
> Quigley, Convention on Foreign Arbitral Awards, 58 A.B.A.J. 821, 822 (1972).

See, also, Aksen, American Arbitration Accession Arrives in the Age of Aquarius: United States Implements United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 3 Sw.U.L. Rev. 1, 25 (1971); McMahon, Implementation of the U N Convention on Foreign Arbitral Awards in the U.S., 26 Arb. J. (n.s.) 65, 85 (1971); cf., e.g. Island Territory of Curacao v. Solitron Devices, Inc., F.2d , slip opinion No. 99 (2d Cir. Dec. 26, 1973) (confirming foreign arbitration award).

The two treaties compel us to grant the same finality to the award in our court as it has been allowed in Japanese courts. Since Copal's award has attained finality in Japan, we must accord it the opportunity to attain finality here in the United States.

It may seem curious that an arbitral award from a foreign land should be accorded more respect than its American counterpart. Had Fotochrome been involved in American Arbitration proceedings, the Referee's order, we assume for the

purposes of this case, would have halted the proceedings or at least prevented the confirmation of the award as a final judgment. In the Matter of Fotochrome, Inc., Decision p.13. The anomaly can be explained by the force of the Supremacy Clause of the Constitution. A treaty, under that clause, is the "supreme" law of the land. It is an expression of the sovereign will speaking with the same authority as a statute.

> "By the constitution, laws made in pursuance thereof, and treaties made under the authority of the United States, are both declared to be the supreme law of the land, and no paramount authority is given to one over the other . . . . If the treaty operates by its own force, and relates to a subject within the power of congress, it can be deemed in that particular only the equivalent of a legislative act . . . . In either case, the last expression of the sovereign will must control."
> The Chinese Exclusion Case, 130 U.S. 581, 600, 9 S.Ct. 623,627-28 (1889).

See also, e.g., Hauenstein v. Lynham, 100 U.S. 483 (1879); Whitney v. Robertson, 124 U.S. 190, 8 S.Ct. 456 (1888); Cook v. United States, 288 U.S. 102, 53 S.Ct. 305 (1933) (treaty superseding statute); Henkin, Foreign Affairs and the Constitution, 163-64 (1972). Cf. United States v. Te[illegible] F.2d , , slip opinion No.746 at 3514-15 (2d Cir. May 15, 1974) (common law yields to treaty). Here the 1953 Treaty with Japan and the 1970 United Nations Convention have

superseded in small measure the 1938 Bankruptcy law.

It is important to note that even if the framers of the Constitution had failed to include the word "treaty" in the Supremacy Clause, the provisions of the United Nations Convention would still be a part of our law and binding upon this court. After being ratified by the Senate, it was implemented as a statute and codified in 9 U.S.C. §§ 201-208 (197

> "The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter."
> 9 U.S.C.§ 201.

See, in general, Comment, International Commercial Arbitration Under the United Nations Convention and the Amended Federal Arbitration Statute, 47 Wash. L.R. 441 (1972); McMahon, Implementation of the UN Convention on Foreign Arbitral Awards in the U.S., 26 Arb. J. (n.s.) 65 (1971).

This case is not without irony. The treaties force us to remove the factor of alienage in determining the recognition of arbitral awards; an award is to be no less final for its Japanese origins. But, in terms of injunctive power the common law factor of alienage remains. It is because the Referee had no jurisdictional authority to enjoin Copal, a Japanese corporation, or the Japan Commercial Arbitration

Association in a foreign land that the award became final and binding under Japanese law and therefore entitled to be final and binding under our own. Copal thus benefits both from the treaties' removal of alienage and from the common law's insistence upon it.

We recognize that this result might somewhat disturb the draftsmen of the Bankruptcy Act. Upon a petition for bankruptcy they would have expected the court to summon the creditors of the bankrupt to press their claims at one time and place. However, we cannot say that the result does not have some support in policy. Given the hazards of international trade -- such as currency fluctuations and governmental shifts -- some stability of expectation in the resolution of disputes through arbitration to protect against the uncertainties of foreign litigation seems desirable. Support for this policy comes from many quarters including the American Bar Association, the American Arbitration Association and the United States Council of the International Chamber of Commerce. See, e.g., Comment, United Nations Foreign Arbitral Awards Convention: United States Accession, 2 [illegible] West. Intl. L. J. 67, 70 n. 15 (1971). Furthermore, the implementing legislation in 9 U.S.C §§ 201-208 (1970)

indicates that the Government of the United States has committed itself to the settlement of international commercial disputes through arbitration. See McMahon, Implementation of the UN Convention on Foreign Arbitral Awards in the U.S., 26 Arb. J. (n.s.) 65, 85 (1971).

International trade is so important to our economy and the peace and welfare of the world that our law is justified in assuaging other nations' suspicions by the firm enforcement of treaties we find applicable. American corporations facing imminently unfavorable arbitrations abroad may not file for Chapter XI arrangements here to avoid final and binding arbitral judgment abroad.

Fotochrome bargained for its contract with Copal and one of the terms bargained for was a provision for arbitration of disputes in Japan. Fotochrome can only be relieved of its contractual burden at the expense of certainty in international commerce. As the Supreme Court recently noted:

> "The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts." M/S Bremen, et al. v. Zapata Off-Shore Co., 407 U.S. 1, 9, 92 Sup.Ct. 1907, 1912 (1972).

International commerce has grown too large and the world too small for American courts to disregard the law of nations, even in favor of the Bankruptcy Act.

IV. CONFIRMATION OF THE AWARD

The arbitral award is entitled to confirmation proceedings where it will be tested under rules designed to assure fairness to the American litigant. The standards for recognizing foreign awards as final under federal law are set forth in Article V of the United Nations Convention (9 U.S.C. § 207 (1970)) in terms much like those used in testing arbitral awards in our own courts. They read as follows:

> "1. Recognition and enforcement of the award may be refused, at the request of the party against which it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
>
> (a) The parties to the agreement referred to in Article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
>
> (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country."

United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Art. V, 21 U.S.T. 2517 at 2520, T.I.A.S. 6997 at 4, 330 U.N.T.S. 38 at 40, 42.

Since the arbitral award has attained the status of a judgment in Japan, it also may be recognized pursuant to New York's statute on recognition of foreign country money judgments. N.Y.C.P.L.R. §§ 5301-5309 (1970). Cf., e.g.,

Island Territory of Curacao v. Solitron Devices, Inc., F.2d ,Slip opinion No.99 at 965 (2d Cir. Dec.26,1973). cf. 9 U.S.C. § 205 (removal from state court of action relating to convention). New York's C.P.L.R. 5304 sets out the grounds for non-recognition in terms designed to ensure due process:

> "(a) No recognition. A foreign country judgment is not conclusive if:
> 1. the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law;
> 2. the foreign court did not have personal jurisdiction over the defendant.
> (b) Other grounds for non-recognition. A foreign country judgment need not be recognized if:
> 1. the foreign court did not have jurisdiction over the subject matter;
> 2. the defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him to defend;
> 3. the judgment was obtained by fraud;
> 4. the cause of action on which the judgment is based is repugnant to the public policy of this state;
> 5. the judgment conflicts with another final and conclusive judgment;
> 6. the proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that court; or
> 7. in the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action."

See, e.g., B.Kulzer, Study, The Uniform Foreign Money-Judg... Recognition Act, N.Y. Jud.Conf. 13th Ann. Rep. 194, 210-218 (1968).

Long before these treaties and statutes were enacted American courts had begun to recognize foreign arbitral awards as well as foreign judgments on a regular basis, subject of course to considerations of fairness and public policy. The leading case of Hilton v. Guyot, 159 U.S. 113, 16 Sup.Ct. 139 (1895) stated the standards of recognition of foreign judgments eighty years ago:

> "[T]here has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it is sitting, or fraud in procuring the judgment . . . ."
> 159 U.S. at 202, 16 Sup. Ct. at 158 (1895).

See Smit, International Res Judicata and Collateral Estop... in the United States, 9 U.C.L.A. L.R. 44, 46-47 (1962). ... standards for recognition of arbitral awards under the tr... and statutes are almost a codification of the principles ... to protect American litigants from recognition of unfairly

obtained foreign judgments and arbitral awards in the past. Compare Restatement Second Conflict of Laws §§ 98 (foreign judgments), 220 (foreign arbitral awards) (1971).

Copal is now free to seek recognition of its award as an American judgment. Fotochrome may prove grounds for non-recognition. If Copal emerges as the victor, issues in the underlying dispute will be res judicata and the amount awarded will be a provable debt for the purposes of the Bankruptcy Act.

V. CONCLUSION

While our decision upholds the international obligations of the United States, it may place American creditors at a disadvantage. The difficulty arises from unresolved inconsistencies between treaty law and preexisting national law. House Report No. 91-1181, 1970 U. S. Code, Cong. and Admin. News 3601 ("American delegation felt that certain provisions were in conflict with some of our domestic laws."); Comment, United Nations Foreign Arbitral Awards Convention: United States Accession, 2 Calif. West.Int. L. J. 67, 70 (1971). Here we find that the treaties take precedence.

The decision of the bankruptcy judge is reversed.

So ORDERED.

Dated: Brooklyn, New York
June 4, 1974

U. S. D. J.

NOTICE OF APPEAL TO THE COURT OF APPEALS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JUN 28 3 09 PM '74
CLERK
U. S. DISTRICT COURT
EASTERN DISTRICT
OF NEW YORK

FOTOCHROME, INC.,

Debtor-Appellant,

--against--

COPAL COMPANY LIMITED,

Claimant-Appellee.

In Bankruptcy
No. 70 B 209

NOTICE OF APPEAL TO COURT OF APPEALS

FOTOCHROME, INC., as Debtor-Appellant, hereby appeals to the United States Court of Appeals for the Second Circuit from the Order entered by HON. JACK B. WEINSTEIN, United States District Judge, dated June 4th, 1974, which reversed the decision of HON. C. ALBERT PARENTE, Bankruptcy Judge, dated July 31, 1973.

Dated: BROOKLYN, NEW YORK
June 27th, 1974

LOUIS P. ROSENBERG
Attorney for Debtor-Appellant

TO : WHITMAN & RANSOM, ESQS.
Attorneys for Claimant-Appellee
522 Fifth Avenue
New York, N. Y. 10036

Service of three (3) copies of the within
Appellant's Appendix is hereby admitted
this 2nd day of October 1974

Whitman & Ransom

Attorney(s) for Cojal Company Limited